

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 UNITED STATES OF AMERICA * 4:13-CR-367-1
5 VS. * 10:07 a.m.
6 DENNIS BARSON, JR., ET AL * July 27, 2015

7 UNITED STATES OF AMERICA * 4:13-CR-367-2
8 VS. * 10:07 a.m.
9 DARIO JUAREZ * July 27, 2015

10 *****

11 UNITED STATES OF AMERICA * 4:13-CR-367-3
12 VS. * 10:07 a.m.
13 EDGAR SHAKBAZIAN * July 27, 2015

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15 HEARING ON SENTENCINGS
16 BEFORE THE HONORABLE MELINDA HARMON
17 Volume 1 of 1, Pages 1 - 124

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1 **PROCEEDINGS**

2 THE COURT: All right. First case, the *United*
3 *States vs. Dennis Barson*, Criminal No. H-13-367, Defendant
4 No. 1.

10:07:39 5 MR. BALBONI: Mark Balboni for the United States.

6 MS. FRAZIOR: Adrienne Frazior for the United
7 States.

8 THE COURT: Good morning.

9 MR. GRAHAM: William Graham for Dennis Barson
10:07:48 10 along with Tate Williams and Philip Hilder.

11 THE COURT: Good morning.

12 MR. GRAHAM: Good morning, Your Honor.

13 THE COURT: Could you come on up, please, with
14 Dr. Barson.

10:07:59 15 MR. HILDER: Dr. Barson is present.

16 THE COURT: You are Dennis B. Barson, Jr.?

17 DEFENDANT BARSON: Yes, ma'am.

18 THE COURT: In a previous proceeding you were
19 found guilty of Count 1, conspiracy to commit health care
10:08:27 20 fraud in violation of 18 United States Code Section 1349
21 and in Counts 2 through 20 health care fraud aiding and
22 abetting in violation of 18 United States Code Sections
23 1347 and 2.

24 Dr. Barson, have you had a chance to read over the
10:08:45 25 presentence report that was filed in your case?

1 DEFENDANT BARSON: Yes, Your Honor.

2 THE COURT: Have you discussed it with your
3 attorneys?

4 DEFENDANT BARSON: Yes, Your Honor.

10:08:50

5 THE COURT: Do you have any questions you would
6 like to ask about the report?

7 DEFENDANT BARSON: No, ma'am.

8 THE COURT: Do you feel you understand what is
9 contained in the report?

10:08:59

10 DEFENDANT BARSON: Yes, ma'am.

11 THE COURT: Do you have any additional objections
12 to the report that were not made by your attorneys on your
13 behalf?

14 DEFENDANT BARSON: No, Your Honor.

10:09:10

15 THE COURT: All right. Let's get started with
16 the objections. The Government's first objection or I
17 guess your only objection is to the obstruction of
18 justice? Are you still maintaining that?

19 MR. BALBONI: Yes, Your Honor.

10:09:22

20 THE COURT: Could you just give me a little
21 argument.

22 MR. BALBONI: Yes, Your Honor. If the Court
23 recalls, of course, Dr. Barson testified in his own
24 defense and his testimony from beginning to end, in the
10:09:35 25 Government's opinion, was manufactured, was structured in

1 such a way as to explain and excuse every possible area of
2 culpability.

3 Just for example, when we're talking about the
4 Medicare application, he said, "I only saw four pages, and
10:09:54 5 I didn't even read them."

6 "I didn't ask whether he was certified."

7 He signed the EDI agreement. He didn't read the
8 certification language there or the second certification
9 language in that document. He didn't read the pages, he
10:10:08 10 told us, or ask for the rest because he trusted
11 Mr. Shakbazyan, the man he had just met that day.

12 The same thing at the -- or a little bit different at
13 the bank. He told us that, yes, he was there. He
14 couldn't deny his signature. But if you recall the
10:10:22 15 fantastic testimony that he portrayed to the jury that he
16 sat side by side with Mr. Shakbazyan; and Mr. Shakbazyan
17 provided to the bank representative things such as the
18 mailing address of the clinic, the phone number for the
19 clinic.

10:10:40 20 It was just from beginning to end, as I said, a
21 fabrication. I don't believe that from start to finish
22 that more than 40 percent of his testimony was factual.

23 That's the Government's position, Your Honor.

24 THE COURT: All right. Response?

10:11:01 25 MR. GRAHAM: Your Honor, Dennis Barson testified

1 truthfully at trial. It may have been inconvenient that
2 he made stupid decisions. Everything he said was
3 truthful. The jury could have and I believe did convict
4 him on the basis of deliberate ignorance all of which --
5 they could have believed all of his testimony and still
6 convicted him. I believe they did so.

7 He testified truthfully, and there is no basis for
8 that objection proposed by the Government.

9 THE COURT: Well, of course, I was here and
10 listened to the testimony. I agree with Mr. Balboni that
11 much of it was not credible; and because he testified not
12 credibly or untruthfully, that does -- that is an
13 obstruction of justice.

14 So I'm going to grant the Government's motion and will
15 add another two points to make it 32, at least at this
16 point.

17 All right. Now your objections, can you tell me about
18 those, please.

19 MR. GRAHAM: Sure, Your Honor. Do you want to
20 address them in order?

21 MR. HILDER: Judge, just for the purpose of the
22 record, we're going to object to the reasonableness of the
23 Court's decision on the basis of that.

24 THE COURT: Objection is overruled.

25 MR. HILDER: Thank you.

1 MR. WILLIAMS: Judge, the objections for Dennis
2 Barson where would you like? Would you like to go in
3 order?

4 THE COURT: Yes, please.

10:12:36

5 MR. WILLIAMS: The first objection relates to the
6 offense conduct in general. That's -- we know that the
7 PSIR contains information that was not admitted at trial
8 and wasn't admissible at trial. He contested every
9 allegation, and we understand that currently the Fifth
10 Circuit allows matters that are inadmissible at trial to
11 be used in a PSIR. However, we have to -- under Fifth
12 Circuit precedent we have to make the objection to
13 preserve error.

10:12:56

14 THE COURT: Your objection is overruled.

10:13:08

15 MR. WILLIAMS: The six level adjustment for the
16 number of victims in Paragraph 45, Barson objected to that
17 for a number of reasons. We briefed this pretty
18 thoroughly. Essentially, it boils down to three
19 components. The first is the legislative history of the
20 enhancement suggests that this is not the type of conduct
21 for which it was created. What happened as we briefed was
22 that there were a number of identity-theft-type cases
23 where there were insured losses, say for example, credit
24 cards, that sort of thing; but people still had to go
25 through the pain and trauma of having to fix their credit.

10:13:27

10:13:43

1 There were noneconomic harms.

2 In a Federal health care program such as Medicare that
3 doesn't happen. There are no co-pays. It doesn't affect
4 their credit. There is no non-economic loss that has to
10:13:58 5 be addressed that turns these people into victims. It
6 doesn't fit the legislative history.

7 Secondly, the people involved aren't victims in any
8 sense of the word. As the Government argues, in fact, in
9 its own forfeiture pleadings these were people that were
10:14:12 10 paid to come to the clinic. If anything, they are
11 unindicted co-conspirators. And to then convert them into
12 victims is inequitable and inappropriate.

13 Lastly, there is an issue with the ex post facto
14 violation. Although the conspiracy -- and I recognize the
10:14:30 15 conspiracy of which he was alleged and convicted goes into
16 the spring of 2010. This application note didn't take
17 effect until November 1st of '09 or thereabouts. The
18 actual alleged use of identifying information, which is
19 the source of the enhancement under the application notes,
10:14:50 20 was completed well before that date. All of the
21 substantive acts were completed well before that date.

22 And so, our argument is that the application of that
23 note to number of victims because the use, which is the
24 subject of that enhancement, was actually completed in the
10:15:08 25 summer and early fall of 2009 prior to the effective date

1 of the enhancement that its application to Dennis Barson
2 is an ex post facto violation.

3 THE COURT: All right. Mr. Balboni?

10:15:25

4 MR. BALBONI: Yes, Your Honor. As we responded
5 to the allegations of the position I think of both
6 Dr. Barson and Mr. Shakbazyan, the ex post facto argument
7 must fail specifically because, first of all, the
8 guidelines choice for the Court was either 2009, which is
9 the offense, or 2015 now or '14 as far as the date of
10 sentencing.

10:15:51

11 Between the two, you would have ex post facto issues
12 with 2014. So we backed it to 2009. The 2009 guidelines
13 go into effect on November 1st of 2009 and, of course, the
14 last acts of the conspiracy occur in February of 2010,
15 making the 2009 guidelines the applicable guidelines.

10:16:10

16 Once you determine that they are, in fact, the
17 applicable guidelines and the note which is -- I'm sorry,
18 Your Honor. I have lost the cite for the note. Oh, there
19 it is.

10:16:40

20 2B1.1 at Note 4(E) applies and it says that a victim
21 includes any individual whose means of identification was
22 used unlawfully or without authority.

10:16:53

23 I guess there could be an argument that to some extent
24 maybe it was used with authority. Although, the evidence
25 is that the people that were paid went one time; but their

1 information was used multiple times to bill Medicare for
2 dates of service where they weren't even present. Also,
3 they are definitely being used unlawfully. That is their
4 Social Security numbers, their HIC numbers, their names
5 and the like are being used to bill Medicare fraudulently.

6 So, therefore, under either of the prongs I believe
7 that we have here a victim; and we certainly have well in
8 excess of 250.

9 THE COURT: All right. I'm going to -- I think
10 that the Government has the argument on this one. So I'm
11 going to overrule your second objection about the six
12 level adjustment for number of victims.

13 MR. WILLIAMS: Your Honor, the third objection is
14 to the lack of a mitigating role reduction which
15 specifically objects to Paragraphs 34 and 47; and Barson
16 objects to the characterization of him as an average
17 participant and the lack of reduction for his mitigating
18 role pursuant to 3B1.2.

19 We contend that he should receive a 4 point downward
20 departure for his mitigating role. The preponderance of
21 the evidence at trial, according to Agent Caddel, was that
22 he did provide a mitigating role in that -- by him closing
23 the account that he closed at Wells Fargo in August of
24 2009 that caused, you know, after his suspicions about
25 Shakbazyan and what was happening when he closed that

1 account that caused hundreds of thousands or exact amount
2 to be almost \$200,000 to be returned to Medicare, to CMS
3 and its administrative contractor Trailblazer because that
4 money was bounced and, in fact, saved money to the
5 Government.

10:18:43

6 In fact, the applications notes say that the lack of
7 the defendant's knowledge or understanding of the scope
8 and structure of the enterprise and what the other people
9 are doing also supports this, the role of a minimal

10:18:56

10 participant.

11 As Adrienne Frazier herself argued at the close of the
12 trial, this was a deliberate ignorance case. There was
13 instruction on it. The Government sought it. Your Honor
14 granted it after we had a charge conference about it. It
15 was argued to the jury that this man did not understand
16 the full scope of the conspiracy and the activities of
17 which he was convicted.

10:19:10

18 And so, in fact, his conduct, if you believe that he
19 did learn in the early fall of '09, in shutting down the
20 account mitigated Medicare's loss. And, therefore, the
21 role reduction is appropriate.

10:19:28

22 MR. BALBONI: First of all, deliberate ignorance
23 is not as Mr. Williams describes. It's not that you don't
24 know what is going on. It's that you do know what is
25 going on, and you choose to ignore it. So we will put

10:19:45

1 that aside for the time being.

2 As far as average participant, without Dr. Barson's
3 participation this scheme would have gone nowhere. He was
4 the one who set up the bank account. He is the one who
10:20:01 5 set up the Medicare provider number. He is the one who
6 used his bona fides, if you will, with Medicare to start
7 the ball rolling for this scheme to eventually come to
8 fruition. And so, I think that it may even be generous to
9 list mister -- or characterize Dr. Barson as only an
10:20:26 10 average participant.

11 THE COURT: I agree. I'm going to overrule the
12 Objection 3 to Paragraphs 34 and 47.

13 MR. WILLIAMS: Your Honor, our fourth objection
14 is related to what Mr. Balboni just discussed; and it's to
10:20:43 15 the abuse of position of trust enhancement in Paragraphs
16 34 and 47.

17 We object to the two-point enhancement for abuse of
18 trust pursuant to 3B1.3 because it's based solely on his
19 application and approval by Medicare as a Medicare
10:20:56 20 provider. It doesn't look to what he actually did to
21 facilitate the commission of the offense and abuse his
22 trust. Dr. Barson, after that process of getting the
23 application, signing it, regardless of whether he read it
24 or not, that is as much conduct as he took at that point.
10:21:19 25 The application and the bank account in furtherance of

1 this scheme is -- you know, whether he chose to ignore it
2 as Mr. Balboni argues today or he just -- he didn't do the
3 things that he should have done to discover.

10:21:37

4 The bottom line is he didn't take anything or do
5 anything affirmatively after that to abuse the trust that
6 Medicare gave him. He basically did what numerous other
7 Medicare providers that work in institutions do. He
8 signed a contract, which is contained within the
9 application. He signed the electronic deposit forms, and
10 that's it. He didn't do anything after that. He wasn't
11 involved in the billing. We never determined exactly
12 where the billing occurred, and he didn't do anything
13 affirmatively after that to abuse his trust.

10:21:58

10:22:14

14 And we think that for the abuse of trust enhancement
15 it requires looking at conduct beyond the initial
16 application. So we think it's appropriate -- the
17 enhancement is inappropriate.

18 He also didn't do anything to conceal the offense.

10:22:28

19 MR. BALBONI: Your Honor, I think again this is,
20 as I said just earlier, Medicare is a huge, to put it
21 mildly, bureaucracy. It is charged with the
22 responsibility of paying for the medical care of tens of
23 millions if not hundreds of millions of individuals. It
24 has under its jurisdiction, if you will, probably over a
25 million doctors. It runs on trust. It runs on the faith

10:22:56

1 that a medical doctor or a doctor of -- a D.O. or an M.D.
2 that when they sign the application and they say I am the
3 person who is running this clinic and I am going to abide
4 by all the Medicare rules and regulations, that is the
5 person they see, if you will, since they never see the
6 individual, is Dr. Barson. And at that point, they are
7 trusting him to abide by all the rules and regulations and
8 to not get involved in a scheme to cheat the system.

9 If the Court needs further evidence of Mr. Barson's or
10 Dr. Barson's role, when he -- according to Mr. Williams --
11 discovered that things just weren't right, he went and
12 closed the bank account. What Medicare directed him to do
13 under all the guidelines that he said he knew and he was
14 going to observe was to alert them to the fraud, not to go
15 to the bank and close it out, take his piece and move on
16 but to alert Medicare that he just discovered that this
17 massive fraud was going on using his provider number; and
18 he didn't do that.

19 THE COURT: I think that the Fifth Circuit has
20 addressed this issue in the *United States vs. Miller*, 607
21 F.3d 144 at 148 through 150, a 2010 opinion, in which the
22 Court says by granting the DME provider a license to
23 provide durable medical equipment the Government entrusted
24 her to provide good faith, accurate information in seeking
25 reimbursement from Medicare and Medicaid. Miller's

1 success in exploiting the lack of Government monitoring
2 vividly demonstrates that her position provided the
3 freedom to commit a difficult-to-detect wrong which is the
4 primary trait of one who holds a position of trust.

10:25:17 5 And definitely Dr. Barson would -- we could replace
6 his name with that of the defendant Miller.

7 So I'm going to overrule the objection to number --
8 the Objection No. 4, abuse of position of trust
9 enhancement, Paragraphs 34 and 47.

10:25:35 10 MR. WILLIAMS: Your Honor, Dr. Barson's fifth
11 objection relates to the other criminal conduct that was
12 included in Paragraphs 58 to 60 in the PSIR. The
13 allegations contained within the PSIR are highly
14 prejudicial and not the subject of any proper criminal
10:25:52 15 history points.

16 For the details with that area that we identified in
17 our objections written, none of these things resulted in
18 conviction; and some of them didn't even result in arrest.
19 And their inclusion is inappropriate. So we object to
10:26:12 20 their inclusion in the PSIR as prejudicial and likely to
21 adversely affect Your Honor's judgment.

22 THE COURT: I'm sorry?

23 MR. WILLIAMS: Likely to adversely affect Your
24 Honor's judgment of this defendant based upon improper
10:26:25 25 considerations of conduct that's not even criminal.

1 THE COURT: Well, I think you know that probation
2 officers one of their tasks is to provide information
3 about the defendant in order to give a full picture of the
4 person. So, I mean, it doesn't affect the guideline
5 calculations.

10:26:48

6 MR. WILLIAMS: I understand that, Your Honor; but
7 Your Honor has -- guidelines are only advisory. Your
8 Honor looks at things well beyond just the guidelines
9 under 18 U.S.C. 3553. The inclusion of these allegations
10 that aren't criminal and are highly prejudicial, we have
11 to object to preserve error in the Fifth Circuit.
12 Otherwise, they will claim, oh, you didn't object. You
13 waived it. I'm trying to preserve error, Your Honor.

10:27:03

14 THE COURT: I understand. I'm going to overrule
15 your Objection No. 5.

10:27:17

16 MR. WILLIAMS: The sixth relates to restitution,
17 objections to Paragraphs 107 to 113; and the -- the
18 objections to the restitution fall in a couple of areas,
19 as we've briefed therein. So I'll just kind of summarize.

10:27:38

20 Firstly, the restitution amount isn't supported by the
21 evidence. The restitution amount includes the entire
22 amount paid by Medicare in this case, but that's not the
23 evidence at trial that was all fraudulent. In fact, if
24 Your Honor recalls Government Exhibits 30 to 37, there
25 were a number of procedures that had nothing related to

10:27:56

1 the anal and rectal tests in the two specific billing
2 codes that the Government focused upon that they did not
3 provide evidence as to what was actually paid related to
4 those. They provided evidence, as we cited herein, as to
5 what was billed -- excuse me. I need to get something --
6 but not what was paid. And none of the testimony from the
7 various witnesses indicated that the other procedures
8 billed and paid did not incur.

9 And so, there is not enough evidence to support that.
10 Specifically, the codes that the Government exclusively
11 focused on with only a subset of patients -- although it
12 wasn't in doubt or dispute that the codes for 51784 and --
13 which is the EMG studies of the anal and urethral
14 sphincter and, also, the code for the rectal tone and
15 compliance test, that they weren't performed on anyone.
16 There were a number of other procedures other than those
17 two that there was no evidence to show that should not
18 have been paid by Medicare. And so they didn't meet their
19 burden to show that the entire amount of \$1.18 million is
20 appropriate restitution.

21 Secondly, the restitution and forfeiture amount to an
22 impermissible double recovery. And I recognize that the
23 Fifth Circuit has addressed this. However, I think that
24 this is an issue ripe for granting of a writ of certiorari
25 because there is a small Circuit split on it. So we have

1 objected to preserve that error. Another Judge on this
2 floor has in fact in 11-CR-861 allowed forfeiture and
3 restitution to offset each other because there is only one
4 United States of America. And the Government is the
5 victim, and it is also the prosecutor. So the forfeiture
6 and restitution are both going to the United States of
7 America.

8 Prior case law, again in the Fifth Circuit, has said
9 it's not an impermissible double recovery. We want to
10 object to both, an order of both or them not offsetting
11 each other in order to preserve error.

12 And then, we think that even if Your Honor finds that
13 the restitution amount was proven up by the Government as
14 to all patients -- which it wasn't. They only called a
15 handful -- it should be limited to the specific codes that
16 it actually produced evidence on and not all procedures.
17 And that was knowable. It was not done, and it -- and as
18 a result, the only evidence that should be admitted for
19 restitution purposes relates to the Code 91120, which was
20 the other, the rectal, sensation, tone and compliance, and
21 51784 and the amount paid related to those particular
22 procedure codes.

23 Unfortunately, the Government did not submit specific
24 evidence of those. It only submitted in Exhibit 32 and
25 elsewhere the amount billed for those codes. So it hasn't

1 met its burden on a restitution number. And while Your
2 Honor can reasonably estimate, this requires a little more
3 information to go from the billed amount, which is almost
4 twice what was actually paid in the aggregate in this
5 case, to the amount paid for those two particular codes,
6 which are the only ones the evidence focused on at trial.

7 THE COURT: Okay.

8 MR. BALBONI: Yes, Your Honor. First of all,
9 starting back at the indictment, in Paragraph 18 it says
10 that the defendants did cause Medicare to be billed for
11 procedures including rectal sensation tests and EMG
12 studies which were never performed.

13 The second, Paragraph 19, the next paragraph talks
14 specifically about Medicare being billed for procedures
15 totaling approximately \$2.1 million. That is, in fact,
16 the total amount of the billing and not the billing just
17 associated with the two mentioned tests. There is no
18 doubt that those two tests were the focus of the
19 prosecution; but the witnesses testified that they didn't
20 get any tests, for the most part, when they were at --
21 when they were at this clinic. Keeping in mind, also,
22 that they were paid to go to the clinic.

23 Also, both at the beginning of the trial and at the
24 end of the trial, Dr. Barson's lawyers argued to the jury
25 and I think also to the Court outside the presence of the

1 jury that they were not contesting the fraud. The fraud
2 was not at issue in their case. As a matter of fact, I
3 believe in closing argument they even told the jury that
4 the Government wasted their time by calling Yvonne Luckie
5 to even discuss whether or not the underlying claims were
6 fraudulent or not because they weren't disputing it. So I
7 think, Your Honor, that under relevant conduct they are in
8 fact -- I'm sorry, Dr. Barson is, in fact, responsible for
9 the entire amount.

10 With respect to the double counting, as Mr. Williams
11 indicated, the Fifth Circuit law indicates that it is not
12 double counting. And, nonetheless, from a practical
13 standpoint the United States doesn't -- any moneys
14 obtained from forfeiture is applied against the
15 restitution amount. So there is no double counting.
16 There is no double dipping. If a dollar is taken from
17 Defendant Barson then that dollar will be credited towards
18 the restitution amount.

19 MR. WILLIAMS: Your Honor, the issue is twofold.
20 First of all, arguments are not evidence. And the
21 restitution order for sentencing is substantively
22 different than the conviction for the fraud itself. And
23 the Government had the opportunity to present evidence
24 that all of the other billing codes were fraudulent, and
25 it didn't do it.

1 Secondly, it also had the opportunity to present the
2 amount paid with respect to the two billing codes rather
3 than just the billed amount.

4 And restitution is to repay the Government for amount
10:34:48 5 paid, not amount billed that it didn't pay. So the amount
6 billed is irrelevant. It's the amount paid by the
7 Government fraudulently that is relevant here. And the
8 Government did not prove that number. It did not put
9 enough evidence in the record for Your Honor to even make
10:35:03 10 a safe estimation of that amount because it did not choose
11 to summarize the amount paid for the two billing codes
12 that it focused upon.

13 So the restitution order for the amount sought is not
14 supported by the evidence let alone a preponderance of the
10:35:22 15 evidence.

16 Secondly, Your Honor, under the Fifth Circuit while
17 the Government may apply money collected against one order
18 first it is still two separate orders that have to be
19 fulfilled that will stand until both are paid.

10:35:38 20 So the double count issue we have briefed. Your Honor
21 can make a ruling as you see fit. We're just trying to
22 preserve the error to -- preserve the issue for appeal,
23 depending upon how you rule.

24 But the focus for the number itself has to be based on
10:35:56 25 evidence in the record, and the amount sought has not been

1 proven to be the total amount fraudulently paid by
2 Medicare as a result of the fraud in this case. And as a
3 result of that, the guidelines calculation is off.

4 THE COURT: Do you understand what he is saying?

10:36:21

5 MR. BALBONI: Yes, Your Honor.

6 THE COURT: Can you respond to it then, please.

7 MR. BALBONI: He is basically saying that the
8 United States did not meet its burden I believe is what he
9 is saying.

10:36:30

10 THE COURT: Yeah.

11 MR. BALBONI: I would take issue with that, Your
12 Honor. First of all, as I said, we discussed it with
13 every beneficiary we called. We cannot call -- if we had
14 called 429 beneficiaries, I don't believe the Court would
15 be happy. I don't think the jury would be happy.

10:36:45

16 And so, what we do is we pick a representative sample.
17 They came in. They testified to the fact that they were
18 paid to go, that they didn't have the testing that was
19 done, not just the anal and rectal testing but all of the
20 testing.

10:37:01

21 The claims themselves are fraudulent from many
22 different perspectives in terms of the preponderance of
23 the evidence. Medicare believes that Dr. Barson is doing
24 the work at his clinic. Every claim that goes in goes
25 with his imprimatur that he, in fact, performed the

10:37:21

1 services or perhaps had a physician's assistant working
2 directly under him to perform them and in some instances
3 the procedures.

10:37:36

4 But we know from the evidence for certain and from
5 Dr. Barson's own testimony he was never there. He never
6 saw a patient. And so, he was -- even though his number
7 was being used and Medicare thought Dr. Barson was the
8 physician, in fact, Dr. Dario, Mr. Juarez was, in fact,
9 the only person there pretending to be a doctor.

10:37:55

10 So I think the Court has more than a preponderance of
11 the evidence upon which to base its decision that the
12 entire \$2.1 million billed to Medicare is as a result of
13 fraudulent procedures.

10:38:25

14 THE COURT: The \$1,188,993.82, which is what the
15 PSR says is restitution, is that dollar amount -- what is
16 that dollar amount, in the Government's view?

17 MR. BALBONI: That dollar amount is all of the
18 billing, all of the claims filed from the Barson Clinic
19 during the time period of the conspiracy.

10:38:48

20 THE COURT: Is it the amounts claimed or the
21 amounts paid?

22 MR. BALBONI: The loss figure for sentencing is
23 the amount billed, the amount claimed.

24 THE COURT: The amount billed?

10:39:00

25 MR. BALBONI: That's correct. I'm sorry.

1 Restitution would be --

2 THE COURT: The actual.

3 MR. BALBONI: That's correct.

4 THE COURT: So that \$1.8 -- that \$1,188,993.82 is
10:39:16 5 the actual amount that the Government paid to the clinic?

6 MR. BALBONI: That's correct, Your Honor.

7 THE COURT: For all the claims?

8 MR. BALBONI: Yes, Your Honor.

9 THE COURT: All right. So it's not the amount
10:39:27 10 billed, which is your argument and that's what I'm not
11 connecting.

12 MR. WILLIAMS: Judge, the Government only put
13 evidence on that two billing codes were fraudulent. And
14 when they did that through their Exhibits 32 through 36
10:39:41 15 they said this is how much was billed for those two
16 billing codes. They never came back and said this is how
17 much was paid for those billing codes. Everybody knows
18 that you don't get paid everything you bill Medicare. In
19 this case, as Your Honor just recognized, \$2.1 total was
10:39:58 20 billed. \$1.2 was paid. The Government didn't separate in
21 the evidence out anywhere how much was paid total for the
22 two fraudulent billing codes.

23 So it could have been \$100,000. It could have been
24 \$400,000. We don't know. We only know how much was
10:40:16 25 billed. Since they only proved fraud on those two codes,

1 that's where the amount of restitution should be limited
2 to. And they didn't segregate that amount actually paid.

3 And if it's -- you do not -- the complication and
4 prolongation of the sentencing process to figure that
10:40:34 5 allows you to not to have to enter an order under the
6 mandatory Victim Restitution Act because you don't have
7 the clear, sufficient evidence that's easily determinable
8 today in front of you to say, "Okay. I know this much was
9 billed on these two codes, but this is how much was paid"
10:40:50 10 because restitution is separate from the loss number for
11 the purpose of the guidelines calculation.

12 \$1.2 and \$2.1, that's the same loss guideline. We're
13 talking about restitution. That's a real dollar number
14 that in a perfect world these three defendants are joint
10:41:06 15 and severally on the hook for and will pay. Whether that
16 happens or not, we don't know.

17 But we do know that your order has to reflect that
18 actual amount, and you don't have sufficient evidence in
19 the record to render an order with the amount actually
10:41:23 20 paid for the two codes that were proven fraudulent.

21 Mr. Balboni forgets the evidence from the witnesses who
22 testified that they did get EKGs. They did get all these
23 other things. You know, a doctor can bill for procedures
24 performed by his staff.

10:41:40 25 And so, not everything that was billed and paid was

1 fraudulent. They didn't prove that. We focused on two
2 billing codes.

3 MR. BALBONI: There is also the medically
4 necessary prong, Your Honor.

10:41:55

5 MR. WILLIAMS: We didn't have a doctor come in
6 and testify as to that stuff. The Government has the
7 burden on that, and under 702 through 6 in *Daubert* that's
8 specialized testimony and no Government physician came in
9 and testified that nobody needed an EKG or a physical or
10 any of the other things.

10:42:11

11 MR. BALBONI: That may be, Your Honor, that we
12 called no doctor to testify. We didn't want to add a
13 doctor to the mix where we didn't have a doctor present in
14 the first place.

10:42:22

15 Dario Juarez was not a physician's assistant. He was
16 not a physician. Yet he was the individual at the clinic
17 day after day ordering the tests. I would say that that's
18 the end of the analysis. You have a nonmedical
19 professional ordering medical tests. I think that's the
20 definition of not medically necessary.

10:42:42

21 The gentleman doesn't have any basis in training or
22 experience to be able to make such a determination so that
23 every diagnostic test, if it was done, and most of them
24 were not, were not medically necessary.

10:43:00

25 Dr. Barson wasn't there to make the call. He was not

1 even -- although, I don't think it would satisfy the
2 requirements; but he wasn't even telephonically connected
3 with Mr. Juarez on a daily basis as these patients came to
4 this clinic didn't come -- as the witnesses told you,
5 didn't come from medical needs. They came to get paid.

6 They all had their own doctors if they truly had a
7 medical problem. When they came, they were examined by
8 Dr. Dario, who then made a medical decision to order
9 essentially the same tests for every individual who came
10 in. And so, therefore, by definition, they are all
11 medically unnecessary.

12 MR. WILLIAMS: That's all outside the record, and
13 I object to it. It's -- the evidence before Your Honor
14 was that --

15 THE COURT: Well, what is outside the record?

16 MR. WILLIAMS: His characterizations of Dario
17 ordering tests. His characterizations that this
18 individual wasn't available by phone. There, in fact, as
19 the evidence in the record will show, there were studies
20 that were viewed by a radiologist, a Dr. Mednik in
21 California, that Dr. Barson was available by phone. There
22 are other nonphysician practitioners. There was Amber
23 Wheeler, a nurse.

24 So according to Mr. Balboni's theory that Medicare --
25 again, this is outside the evidence. That nothing that

1 anybody other than an actual M.D. or D.O. in a doctor's
2 office does is reimbursable. That's not what the evidence
3 before Your Honor and the record from this trial from
4 Yvonne Luckie or other witnesses was.

10:44:43 5 But the bottom line is the evidence in the record
6 doesn't support the restitution order sought. It would
7 support, at most, a restitution order for the amount paid
8 to those two billing codes for the tests that were not
9 performed. Whether other things were performed or not,
10:45:01 10 were necessary, there was no evidence of that. At the
11 most, it's those two particular codes and the amount paid;
12 and they didn't put that in the record.

13 They put the amount billed in the record; but not the
14 amount paid, which is what a restitution order must be
10:45:15 15 based on. Restitution is not mandatory where the record
16 and the evidence doesn't support a specific amount.

17 MR. BALBONI: Just for the record, Your Honor,
18 Amber Wheeler was a brand new medical assistant. She had
19 no more authority to order diagnostic tests than Dr. Dario
10:45:40 20 or George, the technician. They require a doctor or a
21 P.A. under adequate supervision.

22 Dr. Barson was in Austin, Texas for the entire period
23 of this conspiracy except when he came to set up the bank
24 account and the Medicare provider number and two or three
10:46:03 25 times when he came to review a small subset of patient

1 files that Dr. Dario provided to him.

2 There is no evidence in the record that a medical
3 physician was ever present at the Barson Clinic.

10:46:24

4 MR. WILLIAMS: There is also no evidence that one
5 has to be for these other codes to be viable.

10:46:46

6 Your Honor, Government Exhibit 32 on billed amounts
7 says that the EMG was 24 percent. The rectal sensation
8 was 44 percent. All other procedure codes, which may not
9 include diagnostic testing as exclusively as Mr. Balboni
10 suggests -- it includes a lot of other things -- but 32
11 percent of the amount billed. If there was a straight,
12 transitive property of billed and paid, then we should
13 knock 32 percent off the restitution order from the \$1.18
14 which would bring it around to about \$800,000. But I
15 don't think that there is any evidence that it is a
16 straight, transitive property that you can say that the
17 amount billed percentages will equal to that.

10:46:59

18 And as a result of that vagueness in the evidence,
19 Your Honor can't enter the restitution order requested.

10:47:14

20 THE COURT: All right. I understand your point,
21 but I can't go along with it. And I know you are going to
22 appeal this. So we'll give you another appeal point and
23 see what the Circuit says.

24 MR. WILLIAMS: Thank you, Your Honor.

10:47:28

25 THE COURT: I'm going to overrule your objections

1 to Paragraphs 107 through 113.

2 MR. WILLIAMS: I believe that the remaining
3 objections just had to do with the guidelines calculations
4 based upon our objections had they been granted. So we'll
5 move on, Your Honor.

10:47:49

6 THE COURT: Okay. Those will be overruled, too.

7 All right. I will adopt the presentence report as my
8 own, both the findings of fact and the application of the
9 guidelines to the facts with the exception of the

10:48:13

10 obstruction of justice and find a total offense level of
11 32, Criminal History Category 1, which gives a guideline
12 range of 121 to 151 months.

13 Anything else before I pronounce sentence?

14 MR. WILLIAMS: Yes, Your Honor. I would note,
15 having seen the response from the Government in the memo,
16 that in order for that guideline range to be imposed Your
17 Honor would have to impose consecutive sentencing. I
18 would point out that by statute Your Honor has -- that's
19 discretionary with the Court, not mandatory.

10:49:00

20 THE COURT: Okay.

21 MR. WILLIAMS: The statutory maximum for the
22 highest offense of conviction is ten years.

23 THE COURT: Mr. Balboni, any objection or
24 anything further from you before I pronounce sentence?

10:49:12

25 MR. BALBONI: No, Your Honor.

1 THE COURT: All right. Do you have something
2 more you would like to say?

3 MR. GRAHAM: Your Honor, if I may, I would like
4 to make a brief argument.

10:49:22 5 THE COURT: All right. You may, certainly.

6 MR. GRAHAM: Your Honor, I would like to point
7 out that Dennis Barson's wife and identical twin brother
8 and parents are here from various parts of the country.
9 His brother came from Virginia; and his parents are here
10 from New Jersey, as they were throughout the duration of
11 the trial.

12 THE COURT: All right.

13 MR. GRAHAM: He has a strong support network
14 within his family and among his friends and former
10:49:46 15 colleagues. He is fortunate that he still enjoys the
16 support of his family in spite of his felony conviction.
17 I would like to ask the Court to please consider the many,
18 many good things about Dennis Barson, some of which are
19 included in the PSIR and also present in the papers that
10:50:06 20 have been filed and reviewed by the Court. So I won't
21 waste your time rehashing all of them.

22 I would like to point out that he is a veteran and
23 served honorably throughout the War on Terror. He has
24 always been a hard worker. He has worked since, you know,
10:50:22 25 he was 15 years old and has ever since. He took advantage

1 of a scholarship to go to medical school and serve in the
2 Navy thereafter for nearly ten years.

3 The collateral consequences of the conviction -- of
4 this felony conviction for Dennis Barson are immense.

10:50:42 5 They are enormous. He has lost everything he has worked
6 for for the entirety of his adult life. A decade in
7 school, in college, the time spent in the military serving
8 veterans aboard an aircraft carrier or in a clinic
9 thereafter.

10:51:02 10 After he got out of the military, he -- due to his
11 tenacity -- accepted a neurology residency in Austin where
12 he came across country alone to work hard and better
13 himself and get that specialization, which ultimately he
14 did achieve and was board certified.

10:51:20 15 The offense conduct at issue in this case occurred
16 over a very short period of time. The clinic's operations
17 were for a period of a couple of months. This is -- there
18 is no objection for a downward departure for abhorrent
19 conduct because the length of the conspiracy clearly
10:51:41 20 exceeds a week or two or some very short period of time.

21 But this is abhorrent conduct when considered against the
22 good things Dennis Barson has done throughout his life.

23 He will never practice medicine again, almost certain,
24 with an absolute certainty. He has lost, basically,

10:52:04 25 20 years of his life working to where he was at the time

1 of this offense. He has never -- he wasn't aware of
2 insurance billing practices, Medicare billing practices
3 having been an able physician. He wasn't trained as such
4 during his second year of residency when this offense
5 occurred.

10:52:26

6 A sentence at a level of 32 as calculated under the
7 guidelines is -- would be extremely harsh. It would be
8 far more harsh than is necessary under the 3553(a)
9 factors. In consideration of all the good things about
10 Dr. Barson I would ask that the Court vary downward
11 significantly from the guidelines as calculated.

10:52:47

12 In the sentencing memorandum a 30-month period was
13 identified, which is significant. We also ask that he be
14 placed somewhere in Bastrop, which is close to where he
15 lives with his wife and children.

10:53:12

16 A sentence of 10 years or around that range that is
17 calculated would basically -- that would cause Dennis
18 Barson to lose everything. He has lost a lot, but he
19 still has the support of his family. He has always worked
20 hard. He can re-engage. He can become a productive
21 member of society, and putting him behind bars for that
22 amount of time would serve him no -- would not serve any
23 of the 3553(a) factors and would be unjust.

10:53:39

24 THE COURT: All right. Mr. Balboni, response?

25 MR. BALBONI: Yes, Your Honor, very briefly.

10:54:03

1 Despite Dr. Barson's obstructive testimony and because of
2 his service as a veteran and in some respect because of
3 the obvious support he has from his patients, his
4 co-workers and obviously his family, the United States
10:54:29 5 would ask for a sentence at the very bottom of the
6 guideline, 121 months and, of course, restitution and a
7 forfeiture order in the amount of \$1,188,993.82.

8 THE COURT: I think I have to -- I can't sentence
9 him to more than 120 months; is that right?

10:54:55 10 PROBATION OFFICER: May I?

11 THE COURT: Yes? Is that right?

12 PROBATION OFFICER: Because he is being sentenced
13 for multiple sentences you are able to stack them. If I
14 can approach.

10:55:04 15 THE COURT: Surely. Surely.

16 (Discussion off the record at the bench.)

17 MR. HILDER: Excuse me, Judge.

18 THE COURT: Yes.

19 MR. HILDER: Dr. Barson would like to address the
10:55:59 20 Court as well.

21 THE COURT: Of course.

22 DEFENDANT BARSON: Thank you, Your Honor. I'm a
23 little nervous. So I apologize.

24 THE COURT: That's all right.

10:56:07 25 DEFENDANT BARSON: Your Honor, I am ashamed to be

1 standing before you today. I'm ashamed of my stupidity
2 and the decisions I made. I served my country in the
3 United States Navy and continued treating veterans upon
4 discharge.

10:56:23

5 As a convicted felon I have lost everything I've
6 worked for my entire adult life. Standing before you
7 today I am dishonored. My family has also lost a lot, and
8 I am fortunate and blessed to still have their love and
9 support. I am resilient but don't know that I will be so
10 if I am sentenced for so long that I lose my entire family
11 and must start over years from now without their support.

10:56:46

12 This is my last chance, and I humbly ask the Court for
13 mercy so that I can start over and continue being a father
14 to my three small children and a husband to my wife.

10:57:10

15 Thank you, Your Honor.

16 THE COURT: Thank you. Anything else?

17 (No response.)

18 THE COURT: Dennis B. Barson, Jr., is before the
19 Court this morning for sentencing after being found guilty
20 of one count involving conspiracy to commit health care
21 fraud and 19 counts of health care fraud.

10:57:26

22 Dr. Barson is identified as the medical director of
23 the clinic. At the direction of Shakhbazyan, Barson
24 applied for a Medicare provider number for the clinic and
25 opened a bank account in his name into which the Medicare

10:57:46

1 payments would be deposited.

2 Since Barson resided in Austin, Texas, Barson would
3 travel to Houston every two weeks on Saturday to review
4 ten percent of the patients from the clinic. Barson never
5 saw a patient.

10:58:05

6 With Barson's Medicare provider number the personal
7 identifying information of at least 429 beneficiaries was
8 used to submit unauthorized and fraudulent claims from
9 various diagnostic tests which included rectal sensation
10 tests and EMG studies of the anal or urethral sphincter.
11 These tests were medically unnecessary and were not
12 requested by the beneficiary or were not provided.

10:58:19

13 Barson is held accountable for fraudulently billing
14 Medicare approximately \$2,152,455. Medicare paid
15 \$1,188,993.82. In the application to become a Medicare
16 provider Barson agreed to comply with the strict
17 requirements of the law for payment of services and to
18 provide for the medical and health needs of the qualified
19 beneficiaries.

10:58:44

20 But by submitting fraudulent claims as a doctor,
21 Barson's criminal conduct in this offense violated the
22 trust of Medicare. Barson is considered an average
23 participant in this scheme to defraud Medicare.

10:58:56

24 The large amount of money fraudulently obtained over
25 the course of two months is significant, but the defendant

10:59:14

1 has never served a jail term. And thus, I believe that a
2 term of imprisonment at the statutory maximum is
3 appropriate considering what he -- the crime he committed
4 and in conjunction with the factors listed under 18 United
5 States Code Section 3553(a), which is also below the
6 guideline -- the bottom of the guideline range of
7 121 months.

8 This sentence would adequately reflect the seriousness
9 of the offense, promote respect for the law and provide
10 deterrence to future criminal conduct and address the
11 defendant's background and characteristics.

12 A three-year term of supervised release as to each of
13 Counts 1 through 20 to run concurrently for a total of
14 three years would be adequate to allow for monitoring and
15 to provide the defendant with the necessary time to
16 address any criminal monetary penalties imposed.

17 Based upon his financial profile and the substantial
18 amount of restitution owed I believe that Dr. Barson does
19 not have the ability to pay a fine within the prescribed
20 guideline range or even a reduced fine.

21 Pursuant to the Sentencing Reform Act of 1984 it's the
22 judgment of the Court that the defendant, Dennis B.
23 Barson, Jr., is hereby committed to the custody of the
24 Bureau of Prisons for a term of 120 months as to each of
25 Counts 1 through 20 to be served concurrently for a total

1 term of 120 months. This is the maximum statutory
2 penalty, and a sentence below the calculated guideline
3 range of 121 months.

4 Upon release from imprisonment the defendant shall be
5 placed on supervised release for a term of three years.
6 This term consists of three years as to each of Counts 1
7 through 20, all such terms to run concurrently.

8 Within 72 hours of release from the custody of the
9 Bureau of Prisons the defendant shall report in person to
10 the probation office in the district to which the
11 defendant is released.

12 While on supervised release the defendant shall not
13 commit another Federal, State or local crime, shall comply
14 with the standard conditions that have been adopted by
15 this Court under General Order No. H-1996-10, abide by any
16 mandatory conditions required by law and shall comply with
17 the following additional conditions.

18 The defendant shall not possess a firearm, ammunition,
19 destructive device or any other dangerous weapon. The
20 defendant shall cooperate in the collection of a DNA
21 sample from the defendant if the collection of such a
22 sample is authorized pursuant to Section 3 of the DNA
23 Analysis Backlog Elimination Act of 2000.

24 The defendant is required to provide the probation
25 officer access to any requested financial information, and

1 the defendant is prohibited from incurring new credit
2 charges or opening additional lines of credit without
3 approval of the probation officer. The defendant is
4 prohibited from possessing a credit access device such as
5 a credit card unless first authorized by the probation
6 officer.

7 The defendant shall participate in a program,
8 inpatient or outpatient, for the treatment of drug and/or
9 alcohol addiction dependency or abuse which may include
10 but not be limited to urine, breath, saliva and skin
11 testing to determine whether the defendant has reverted to
12 the use of drugs and/or alcohol.

13 Further, the defendant shall participate as instructed
14 and as deemed necessary by the probation officer and shall
15 comply with all rules and regulations of the treatment
16 agency until discharged by the program director with the
17 approval of the probation officer.

18 The defendant shall further submit to such drug
19 detection techniques in addition to those performed by the
20 treatment agency as directed by the probation officer.
21 The defendant will incur costs associated with such
22 drug/alcohol detection and treatment based on ability to
23 pay as determined by the probation officer.

24 It is further ordered that the defendant shall pay
25 restitution in the amount of \$1,188,993.82 to Medicare

1 payable to the following address: CMS Division of
2 Accounting Operations; 7500 Security Boulevard; Mail Stop
3 C3-1-03; Baltimore, Maryland, 21244-1850.

4 It is further ordered that the defendant is jointly
5 and severally liable with Dario Juarez, Criminal
6 No. 4:13-CR-367, Defendant 2, and Edgar Shakhbazyan,
7 Criminal No. 4:13-CR-367, Defendant 3, to pay restitution
8 in the amount of one million \$1,188,993.82 to Medicare.

9 The defendant's restitution obligation shall not be
10 affected by any restitution payments that may be made by
11 other defendants in this case except that no future
12 payments shall be required after the sum of the amounts
13 paid by all defendants has fully covered all the
14 compensable losses.

15 It is further ordered that the defendant shall pay to
16 the United States a special assessment of \$2,000. The
17 Court finds that the defendant does not have the ability
18 to pay a fine and will waive the fine in this case.

19 Having assessed the defendant's ability to pay, payment of
20 the total criminal monetary penalties shall be due, as
21 follows: The defendant shall make a lump sum payment of
22 \$2,000 due immediately, balance due at 50 percent of any
23 wages earned while in prison in accordance with the Bureau
24 of Prisons Inmate Financial Responsibility Program. Any
25 balance remaining after release from imprisonment shall be

1 due in monthly installments of at least 10 percent of the
2 defendant's gross income to be charged -- I'm sorry -- to
3 be changed during supervision, if needed, based on the
4 defendant's changed circumstances or \$200 per month,
5 whichever is greater, to commence 30 days after release
6 from imprisonment to a term of supervision. Payment is to
7 be made to the United States District Clerk, Southern
8 District of Texas.

9 I will recommend to the Bureau of Prisons that
10 Dr. Barson be allowed to be designated to a facility as
11 close to Bastrop -- well, the facility in Bastrop, Texas;
12 but you understand that they do not have to follow my
13 recommendation?

14 DEFENDANT BARSON: (Nodding head up and down.)

15 THE COURT: Dr. Barson, to the extent you have
16 not waived your right to appeal, you have a right to
17 appeal your conviction and your sentence. If you do not
18 have the funds to provide for an attorney, one will be
19 provided for you along with any transcripts or other
20 documents necessary for such an appeal. Anything else?

21 MR. BALBONI: Yes, Your Honor. A couple of
22 things. First of all, with respect to the Court's
23 restitution order we ask that that be due and payable
24 immediately, also.

25 THE COURT: All right. I will order that the

1 restitution order be due and payable immediately.

2 MR. BALBONI: And, also, Your Honor, I believe
3 that the Government has provided a proposed preliminary
4 order of forfeiture with respect to the same amount, one
5 million one --

11:06:45

6 THE COURT: A preliminary order of forfeiture.

7 MR. BALBONI: We would ask that the Court make
8 the order of forfeiture part of its final judgment.

9 THE COURT: Yes.

11:07:15

10 MR. GRAHAM: Your Honor, we've objected to the
11 order of forfeiture and requested a hearing on that
12 matter. I believe at least one other defendant has, as
13 well.

11:07:26

14 Under the Federal Rules of Criminal Procedure cited I
15 believe that a hearing has to be conducted. We weren't
16 sure exactly if you were going to join those matters or if
17 that was -- but we have filed a number of -- both a
18 response and then based on some additional pleadings
19 another response to that additional pleading and sur-reply
20 to the Government's reply.

11:07:45

21 Secondly, we would ask that Dr. Barson be able to
22 self-surrender to the Bureau of Prisons.

23 THE COURT: Is that okay with you?

24 MR. BALBONI: With respect to self-surrender?

11:08:00

25 THE COURT: Self-surrender.

1 MR. BALBONI: No objection.

2 THE COURT: Then, yes, Dr. Barson, you may until
3 you are designated to a facility; and you will sign a
4 document that says you understand that you will report to
5 the designated facility on the day and at the time
6 indicated in an order that will be provided in the future.

11:08:14

7 DEFENDANT BARSON: Yes, ma'am.

8 THE COURT: You understand that. Okay.

9 As far as the forfeiture, do we have to have -- do we
10 have to have a hearing? Do you agree?

11:08:25

11 MS. ROLLINSON: They have a right to ask for a
12 hearing, Your Honor. Kristine Rollinson.

13 THE COURT: Yes.

14 MS. ROLLINSON: They have a right to ask for a
15 hearing. They did. They never got one set, and they can
16 have it right now. We often do it right at sentencing.
17 But the issues are not all that different from the
18 restitution. The amount of proceeds we're alleging are
19 the same amount as restitution. We just ask that a
20 separate order be imposed in accordance with the Fifth
21 Circuit decision.

11:08:34

11:08:48

22 THE COURT: All right. Shall we -- well, let's
23 don't do the hearing. We'll do the hearing for all three
24 defendants after I have completed the sentencing of all
25 three defendants. How about that?

11:08:59

1 MS. ROLLINSON: So long as the forfeiture is made
2 part of the sentence.

3 THE COURT: Right. And then the order will -- if
4 I grant the forfeiture order, then it will be made part of
5 the judgment.

11:09:08

6 MS. ROLLINSON: Yes, Your Honor.

7 THE COURT: Yes.

8 MR. HILDER: Judge, may I also impose an
9 objection to the reasonableness of the sentence as well?

11:09:15

10 THE COURT: You may. Overruled.

11 MR. GRAHAM: Yes, Your Honor. The Fifth Circuit
12 requires that we object to it as substantively -- I'm
13 trying to remember the words -- substantively
14 unreasonable.

11:09:24

15 THE COURT: Yes. I understand. I'm going to
16 overrule that.

17 MR. GRAHAM: Thank you, Your Honor.

18 THE COURT: All right. If you all would remain
19 in the courtroom, or you can take a bathroom break if you
20 want to. I need you to come back for the forfeiture
21 hearing at the conclusion of the sentencing process.

11:09:32

22 The next case, Dario Juarez, Criminal No. H:13-367,
23 Defendant No. 2.

24 MR. DUPONT: Good morning, Your Honor. How are
25 you?

11:10:04

1 THE COURT: Fine.

2 MR. DUPONT: Todd DuPont for Mr. Juarez.

3 THE COURT: Sorry?

4 MR. DUPONT: Todd DuPont for Mr. Juarez.

11:10:13

5 MR. BALBONI: Al Balboni for the United States.

6 MS. FRAZIOR: Adrienne Frazier for the United

7 States.

8 THE COURT: You are Dario Juarez?

9 DEFENDANT JUAREZ: Yes, ma'am.

11:10:22

10 THE COURT: I don't think the microphones are on.

11 (Discussion off the record.)

12 THE COURT: In a previous proceeding you were
13 found guilty of Count 1, conspiracy to commit health care
14 fraud in violation of 18 United States Code Section 1349
15 and Counts 2 through 20 health care fraud in violation of
16 18 United States Code Sections 1347 and 2.

11:10:50

17 Mr. Juarez, have you had a chance to read over the
18 presentence report that was prepared in your case?

19 DEFENDANT JUAREZ: Yes, ma'am.

11:11:08

20 THE COURT: Have you discussed it with
21 Mr. DuPont, your attorney?

22 DEFENDANT JUAREZ: Yes, ma'am.

23 THE COURT: Do you feel you understand what is
24 contained in the report?

11:11:14

25 DEFENDANT JUAREZ: Yes, ma'am.

1 THE COURT: And do you have any questions you
2 would like to ask about it at this time?

3 DEFENDANT JUAREZ: No, ma'am.

4 THE COURT: Mr. DuPont has made some objections
11:11:27 5 to the presentence report on your behalf. Do you have any
6 additional objections you would like to make to the
7 report?

8 DEFENDANT JUAREZ: No, ma'am.

9 THE COURT: No. Okay. All right. Mr. DuPont.

11:11:37 10 MR. DUPONT: Thank you. So maybe just for
11 housekeeping, Mr. Juarez has lodged five objections; and I
12 don't really know pragmatically how to adopt them for the
13 purposes of his record the arguments lodged by counsel for
14 Dr. Barson. But, in essence, they are substantively the
11:12:01 15 same arguments. It may be easier for me to articulate
16 that than perhaps --

17 THE COURT: Just briefly. Just briefly say what
18 it is, and I will remember the arguments that counsel for
19 Dr. Barson made.

11:12:14 20 MR. DUPONT: So at least I would like to attempt
21 to somehow incorporate those arguments into Mr. Juarez's
22 record.

23 THE COURT: All right.

24 MR. DUPONT: The first one, which was an
11:12:24 25 objection to the generalization of the offense conduct.

11:12:52

1 Probation had used the reports. The argument was that for
2 Mr. Williams and, of course -- from counsel Williams and
3 on behalf of Mr. Juarez that we objected to the way
4 probation wrote it versus the way the evidence was
5 presented. That would be the first objection.

6 THE COURT: You are talking about just general
7 conduct?

8 MR. DUPONT: Correct.

9 THE COURT: All right. I will overrule that one.

11:13:01

10 MR. DUPONT: The second was -- and the Court has
11 ruled with regard to the six level adjustment for the
12 number of victims. I believe the Court has ruled on that
13 one.

11:13:12

14 THE COURT: That's right. That was overruled,
15 also. I will overrule your objection.

11:13:31

16 MR. DUPONT: And so, I think that I'm going to
17 skip one. The fourth one was with regards to the
18 restitution, and we've heard many of the arguments with
19 regards to that. So I'll adopt Dr. Barson's argument with
20 regards to the restitution.

21 THE COURT: I will overrule your objection.

22 MR. DUPONT: I will leave the arguments lodged
23 there.

11:13:46

24 Which I will back up to role, at least for Mr. Juarez.
25 The presentence report indicated he had an average

1 participation in this conspiracy. I would like to note
2 just a few things.

3 First, Mr. Balboni argued in the last sentencing
4 hearing a few things of note. First, that without
11:14:09 5 Dr. Barson's participation they wouldn't have got
6 anywhere. And I think I quote that. That's certainly not
7 true for Mr. Juarez.

8 And more offensively, his argument was that Dr. --
9 Mr. Juarez ordered the tests. There is zero evidence of
11:14:36 10 that contained in an 8-page file that Mr. Juarez ordered
11 tests. And I'll reflect to the record for that outside of
12 my argument or his assertion of that fact, which
13 Dr. Barson's attorneys disagreed with as well.

14 So with regards to participation I would like to go up
11:14:59 15 to 10,000 feet if I can, theoretically, here in the
16 courtroom and look at what we have. You have Edgar
17 Shakbazyan that likely is the mastermind and who,
18 interestingly, showed up and pled guilty on the first day
19 in court. Admirable. I'm surprised he did show up, in
11:15:18 20 fairness; and he did.

21 You can't do this scheme without a doctor. We know
22 that, too. Everybody else in this conspiracy becomes a
23 pawn to Edgar Shakbazyan or any of these people that set
24 these clinics up. Everybody else is a pawn because you
11:15:40 25 can't do it without a doctor. We know that. Short of

1 these folks, these people -- and we know that they found
2 billing codes and other things in California. I don't
3 even know if you need a doctor. They could probably steal
4 the doctor's information and still pull this scheme off.

11:16:01

5 So what is this man guilty of? Honestly? The defense
6 -- well, the jury spoke. They convicted him wholesale,
7 just like Dr. Barson. Respectfully, even today, myself --
8 and not to offend the Court's sensibilities. We respect
9 their verdict, but we disagree with them.

11:16:24

10 Dr. Juarez was paid \$20,000 out of one point -- in
11 essence, \$1.9 million. His take in this conspiracy is one
12 one-hundredths of a percent. And that -- I mean, that's
13 just plugging in the numbers in a calculator.

11:16:52

14 This is not a man that was peddling drugs or writing
15 prescriptions. He wasn't armed robbing people. This man,
16 if anything, stood on trial for practicing medicine while
17 he is a felon. If we call it even, that's what is up.

11:17:18

18 And so, is there any redeeming qualities to that? I
19 don't know. I have thought about what I'm going to say to
20 you for months. However, the reality is the scheme is, as
21 follows: The Shakbazyans of the world need doctors that
22 are ignorant or that have trouble early on so they can get
23 them in there to promise them the moon. All you have to
24 do is watch or view ten percent of the patient files; and
25 we're going to pay you \$7,000 or \$10,000, whatever it is.

11:17:42

1 That's all it is. This scheme is over and over, and this
2 courthouse is filled with that.

3 But they also need the front of the house so the
4 doctor feels comfortable continuing while these people are
11:17:57 5 billing ridiculously. That's where he comes in. Because
6 they also need people like him because he wants to work
7 and do good by medicine. But he is not employable because
8 he is a felon, and Shakbazyan knows that because he put --
9 he responded to an ad that's on Craig's list.

11:18:23 10 Did he know about this conspiracy? The jury believes
11 he did. But out of 20 witnesses that testified right
12 there as I am sitting in the back way over there, I only
13 cross-examined three people because his name only came up
14 three times out of 20 witnesses. To me that's important.

11:18:44 15 This scheme did not need his help. It was not
16 dependent on Dario Juarez. He is a pawn easily to be
17 replaced. There were bigger people here.

18 You can see I'm somewhat passionate because this was a
19 big case and involves a lot of moving parts. And I
11:19:14 20 listened intently to Dr. Barson's sentencing and arguments
21 from counsel and your rulings, and I would ask that you
22 consider his level of involvement not only in terms of
23 participation, because his criminal history is what hurts
24 him here, if we look at it honestly, because it moves him
11:19:41 25 right. And that's what it is. There is no argument

1 against his criminal history.

2 But if we look at his role 10,000-foot up do we treat
3 him the same as Dr. Barson? I would ask you not to. I
4 have also submitted -- I believe everybody received copies
11:20:09 5 of letters, of character letters. And there are plenty of
6 people that will speak on his behalf. The man is a
7 God-fearing man and has demonstrated that while he has
8 been incarcerated. He has high degrees, and his criminal
9 history is all about trying to practice medicine. It's
11:20:37 10 weird. In 16 years I have never seen a defendant like
11 him. Usually my clients are drug dealers and kill people.
12 That's not the case here.

13 So I would ask you to again vary as requested by
14 previous counsel. The numbers are the same for him,
11:21:01 15 Judge. They are the same. And so that's really all I
16 have got. I would ask you to consider the 10,000-foot
17 view on him, preserving all the arguments that we have
18 that may need to be litigated in the Fifth Circuit. We
19 recognize that. And they are real arguments. These are
11:21:20 20 important issues. I believe he might have something --
21 well, I guess you probably --

22 THE COURT: Let's see what Mr. Balboni has to
23 say.

24 MR. BALBONI: Thank you, Your Honor. While
11:21:34 25 Mr. DuPont is correct this scheme would not have been able

11:21:51

1 to go forward without Dr. Barson as we argued earlier;
2 likewise, it couldn't go forward without Mr. Juarez. It
3 didn't have to be Mr. Juarez. It could have been
4 Mr. Smith. But in this case it was Mr. Juarez, and he was
5 the face of the Barson Clinic. He was the doctor that
6 patients thought they were seeing. He was the doctor that
7 Amber Wheeler, the medical assistant, thought was the only
8 doctor. She was the only other or the only certified
9 medical professional in the clinic; and she testified
10 that, as far as she knew, Dario Juarez was a doctor.

11:22:15

11 To keep up the facade, to keep up the scheme, somebody
12 had to play the role of the doctor. So the patients would
13 come in. They would be, quote, seen by a doctor. And
14 part of that is because if there is an unravelling, if
15 Medicare were to come by, there has to be, again, some
16 plausible -- at least in Houston. I understand in other
17 parts of the country they don't bother. But in Houston
18 they need to have a plausible, operating medical clinic.
19 And that's what they had in the Barson Clinic; and

11:22:38

11:22:57

20 Mr. Juarez was -- to everybody who went to that clinic, he
21 was the doctor. So without him the clinic would not be
22 able to function the way it was designed.

11:23:19

23 As Mr. DuPont pointed out, the defendant has an
24 extensive criminal background; and he likes to pretend
25 that he is a doctor. He has at least two convictions for

1 practicing medicine without a license. He pled guilty to
2 both of those. And essentially that's what he was doing
3 for the Barson Clinic. He was, once again, practicing
4 medicine without a license, pretending to be a doctor all
5 to facilitate this \$1.2 or \$2.1, depending on how you look
6 at it, million dollar fraud on Medicare.

7 I think given all that, Your Honor, the United States
8 is asking for a sentence midway in the range of a sentence
9 for 145 or, excuse me, 145 months as well as the
10 restitution in the amount we have been discussing and a
11 preliminary order of forfeiture in a similar amount.

12 THE COURT: Okay. Mr. Juarez, anything you would
13 like to say before I pronounce sentence?

14 MR. DUPONT: If I may respond, respectfully.

15 THE COURT: Yes. Certainly.

16 MR. DUPONT: I did miss a few things that I would
17 like to respond to Mr. Balboni. This is splitting a hair,
18 but he is a doctor. He has a PhD. While he is a felon,
19 he is still a doctor. I'm a doctor. Mr. Balboni is a
20 doctor. Now, we don't call ourselves doctors; but we have
21 JDs.

22 So, secondly, I don't want us all to get confused with
23 what arguments were with his role versus what the three
24 people said. Okay. So I would like the Court to, if
25 possible, recall upon your recollection of the people that

1 testified about his role because argument believes this
2 man to be running around like a doctor; but only three
3 people even brought his name up. That's why I never -- I
4 didn't stand up 17 times. I didn't ask anybody any
5 questions. I didn't need to.

11:25:20

6 And we all know -- I think it's common understanding
7 amongst people that are in our profession -- you can run a
8 clinic with a PA. You don't have to have a doctor. It's
9 -- I go to CVS, and I see a PA. The doctor is not there.

11:25:43

10 As long as they are in arm's reach, right? So the
11 perception that they think he is a doctor is not the legal
12 standard.

13 Lastly, I forgot to argue with regards to -- but I
14 suppose the Court when they make -- when she makes her
15 findings that I had objected to, well, role. So my fifth
16 objection was for the calculation.

11:26:00

17 THE COURT: All right.

18 MR. DUPONT: I think that's all I have, Your
19 Honor, hopefully.

11:26:13

20 THE COURT: All right. I need to rule on this
21 before I ask Mr. Juarez if he has any comments. I have to
22 say that the average participant is somebody in my mind
23 that was present, functioning, doing something on many
24 occasions or sometimes only one but usually just a person
25 who is in there doing it on a daily basis; and there is

11:26:56

1 nothing extraordinary that would take that person out of
2 that calculation, either something much more than an
3 active participant, like being the leader or the
4 organizer, or something less, a minimal person.

11:27:27 5 I mean, the receptionist, the medical assistant who
6 was there was not charged with a crime. She might have
7 been charged with a crime. Had she been charged with a
8 crime she would be the kind of person who could be a
9 minimal or minor participant, not Mr. Juarez.

11:27:49 10 So I'm going to overrule that objection; and that
11 means that I'm going to overrule your last objection,
12 which is a recalculation of the guidelines. And I find a
13 total offense level of 28 and a criminal history category
14 of 5, which gives a guideline provision range of 130 to
11:28:11 15 162 months.

16 All right. Mr. Juarez, anything you would like to say
17 before I pronounce sentence?

18 DEFENDANT JUAREZ: I would just like to say thank
19 you for hearing my case and also thank you to everyone and
11:28:24 20 I respect the decision that you made but I disagree with
21 it and I thank you very much for hearing me.

22 THE COURT: All right. Thank you. Anything else
23 from anyone before I pronounce sentence?

24 MR. DUPONT: I don't believe so.

11:28:39 25 MR. BALBONI: No, Your Honor.

1 THE COURT: Dario Juarez is before the Court for
2 sentencing after pleading guilty to one count involving
3 conspiracy to commit health care fraud, 19 counts of
4 health care fraud.

11:28:57 5 Mr. Juarez, though not licensed or medically trained,
6 is identified as the physician's assistant. Juarez saw
7 all of the patients as if he were a doctor and was known
8 as Dr. Dario by some people, including the medical
9 assistant at the clinic.

11:29:14 10 The scheme involved the use of the personal
11 identifying information of at least 429 beneficiaries to
12 submit unauthorized, fraudulent claims for various
13 diagnostics tests which included rectal sensation tests
14 and EMG studies of the anal or urethral sphincter. These
11:29:34 15 tests were medically unnecessary and were not requested by
16 the beneficiary or were not provided.

17 Mr. Juarez was held accountable for fraudulently
18 billing Medicare approximately \$2,152,455. Medicare paid
19 \$1,188,993.82. Mr. Juarez is deemed an average
11:29:56 20 participant in this scheme to defraud Medicare.

21 The large amount of money fraudulently obtained over
22 the course of two months is significant. Due to the
23 significant prison range and in conjunction with the
24 factors listed under 18 United States Code Section 3553(a)
11:30:11 25 a sentence at the bottom of the guideline range of

1 130 months is appropriate and would adequately reflect the
2 seriousness of the offense, promote respect for the law,
3 provide deterrence to future criminal conduct and address
4 the defendant's background and characteristics. And a
5 three-year term of supervised release would be adequate to
6 allow for monitoring and to provide the defendant with the
7 necessary time to address the criminal monetary penalties
8 imposed.

9 And I should backtrack a little bit and say that I
10 adopt the presentence report as my own, both the findings
11 of fact and the application of the guidelines to the facts
12 and find a total offense level of 28 and criminal history
13 category of 5.

14 Based upon the defendant's financial profile and
15 substantial amount of restitution owed it is considered
16 that he does not have the ability to pay a fine within the
17 prescribed guideline range nor does he have the ability to
18 pay a reduced fine. And, therefore, a fine will be waived
19 in this case.

20 Pursuant to the Sentencing Reform Act of 1984 it is
21 the judgment of the Court that the defendant, Dario
22 Juarez, is hereby committed to the custody of the Bureau
23 of Prisons to be imprisoned for a term of 120 months as to
24 each of Counts 1 through 19 to run concurrently to each
25 other and consecutive to ten months as to Count 20 for a

1 total term of 130 months.

2 Upon release from imprisonment the defendant shall be
3 placed on supervised release for a term of three years.

4 This term consists of three years as to each of Counts 1
5 through 20, all such terms to run concurrently.

11:31:50

6 Within 72 hours of release from the custody of the
7 Bureau of Prisons the defendant shall report in person to
8 the probation office in the district to which the
9 defendant is released.

11:32:00

10 While on supervised release the defendant shall not
11 commit another Federal, State or local crime, shall comply
12 with the standard conditions adopted by this Court under
13 General Order No. H-1996-10, abide by any mandatory
14 conditions required by law and shall comply with the
15 following additional conditions.

11:32:17

16 The defendant shall not possess a firearm, ammunition,
17 destructive device or any other dangerous weapon. The
18 defendant shall cooperate in the collection of a DNA
19 sample from the defendant if the collection of such a
20 sample is authorized pursuant to Section 3 of the DNA
21 Analysis Backlog Elimination Act of 2000.

11:32:29

22 The defendant is required to provide the probation
23 officer access to any requested financial information.

24 The defendant is prohibited from incurring new credit
25 charges or opening additional lines of credit without

11:32:48

1 approval of the probation officer. The defendant is
2 prohibited from possessing a credit access device such as
3 a credit card unless first authorized by the probation
4 officer.

11:33:00 5 It is further ordered that the defendant pay
6 restitution in the amount of \$1,188,993.82 to Medicare
7 payable to the following address: CMS Division of
8 Accounting Operations; 7500 Security Boulevard; Mail Stop
9 C3-1-03; Baltimore, Maryland 21244-1850.

11:33:25 10 It is further ordered that the defendant is jointly
11 and severally liable with Dennis B. Barson, Jr., Criminal
12 No. 4:13-CR-367, Defendant 1, and Edgar Shakhbazyan,
13 Criminal No. 4:13-CR-367, Defendant 3, to pay restitution
14 in the amount of \$1,188,993.82 to Medicare. The

11:33:49 15 defendant's restitution obligation shall not be affected
16 by any restitution payment that may be paid by other
17 defendants in this case except that no further payment
18 shall be required after the sum of the amounts paid by all
19 defendants has fully covered all compensable losses.

11:34:05 20 It is further ordered that the defendant shall pay to
21 the United States a special assessment of \$2,000. The
22 Court finds that the defendant does not have the ability
23 to pay a fine and will waive the fine in this case.

24 Having assessed the defendant's ability to pay,
11:34:20 25 payment of the total criminal monetary penalties shall be

1 due, as follows: The defendant shall make a lump sum
2 payment of \$2,000 due immediately. Balance due at
3 50 percent of any wages earned while in prison in
4 accordance with the Bureau of Prisons Inmate Financial
5 Responsibility Program.

11:34:38

6 Any balance remaining after release from imprisonment
7 shall be due in monthly installments of at least 10
8 percent of the defendant's gross income to be charged
9 during supervision, if needed, based on the defendant's
10 changed circumstances or \$300 per month, whichever is
11 greater, to commence 30 days after release from
12 imprisonment to a term of supervision. Payment is to be
13 made to the United States District Clerk, Southern
14 District of Texas.

11:34:50

15 And I will order, also, that the \$1,188,993.82 of
16 restitution payable to Medicare is due and owing
17 immediately along with the special assessment.

11:35:01

18 Mr. Juarez, to the extent you have not waived your
19 right to appeal, you have a right to appeal your
20 conviction and your sentence. If you do not have the
21 funds to pay for an attorney, one will be provided for you
22 at the Government's expense along with any transcripts or
23 other documents necessary for such an appeal.

11:35:28

24 Is there anything else?

25 MR. DUPONT: Yes, Judge. I was appointed on the

11:35:38

1 panel to represent Mr. Juarez. Of course, we fought long
2 and hard. I would ask to withdraw with the idea that I
3 would like a fresh set of eyes to review this case. One
4 perhaps that does appeals for the CJ panel.

11:35:59

5 THE COURT: All right. I will grant your motion.
6 I want you to be sure that I will send this down to the
7 duty magistrate to appoint Mr. Juarez a new attorney for
8 the appeal. I want you to keep an eye on this case until
9 that is done.

11:36:14

10 MR. DUPONT: Okay.

11 THE COURT: So we don't fall through the cracks
12 on this.

13 MR. DUPONT: Okay.

14 THE COURT: Yes.

11:36:19

15 MR. BALBONI: Yes, Your Honor. I know the Court
16 is going to address this after we finish the three
17 sentencings. Again, the United States requests when that
18 is done that an order of forfeiture be made. Well,
19 actually, Your Honor, I don't know that you have ordered
20 forfeiture in this case. You did restitution, and you did
21 special assessment. But the United States has filed an
22 order of forfeiture, also, with respect to Mr. Juarez.

11:36:32

23 THE COURT: Okay.

24 MR. DUPONT: Is that --

11:36:53

25 THE COURT: Well, I don't have the order with me

1 up here. I don't know why, but I don't.

2 MR. BALBONI: I may be able to get one, Your
3 Honor.

4 THE COURT: All right.

11:37:03

5 MR. DUPONT: We didn't participate in the
6 last-minute legal wranglings with regard to this, Your
7 Honor. I'm happy to stick around and participate, if need
8 be.

11:37:19

9 THE COURT: To participate in the -- your
10 objections to -- to participate in a hearing on the order
11 imposing --

12 MR. DUPONT: I have not filed any pleadings in
13 that regard. I think that was more so with Mr. Shakbazyan
14 and Dr. Barson.

11:37:35

15 THE COURT: Well, I have got -- thank you.
16 Ms. Hawkins has handed me the preliminary order of
17 forfeiture that's been filed for all three defendants, and
18 it was just one order.

11:37:51

19 MS. ROLLINSON: I believe there are three
20 separate orders. One motion and an order for each
21 defendant.

22 THE COURT: Okay. Well, all right. Whatever. I
23 think that --

24 MS. ROLLINSON: Yes, ma'am.

11:37:57

25 THE COURT: I think they are pretty much

1 identical.

2 MR. BALBONI: They are, Your Honor.

3 THE COURT: There is also an order that
4 Mr. Balboni handed me imposing personal monetary judgment
11:38:09 5 against Mr. Juarez.

6 MR. BALBONI: Yes, Your Honor. I'm sorry. The
7 order of forfeiture includes a personal money judgment.
8 Yes, Your Honor.

9 THE COURT: Okay. All right. So there would
11:38:24 10 just be one of those?

11 MR. BALBONI: Yes, Your Honor.

12 THE COURT: All right. Okay. All right. Please
13 stick around and make any objections that you may have to
14 the order of forfeiture.

11:38:34 15 MR. DUPONT: Yes, Your Honor.

16 THE COURT: You all may have a seat.

17 (Recess from 11:38 to 12:00.)

18 THE COURT: Please be seated, ladies and
19 gentlemen. I understand Mr. DuPont has some more he wants
12:00:17 20 to put on the record. We'll take you up next. Well,
21 let's do it now.

22 MR. DUPONT: My apologies.

23 THE COURT: That's all right.

24 MR. DUPONT: Just two things. I've noticed the
12:00:29 25 Government, in fact. I would ask for placement with

1 regards to a facility for Mr. Juarez. I understand he has
2 family members from the valley. They were present in the
3 courtroom. I think Three Rivers or something in San
4 Antonio would be the request to include in the order.

12:00:48

5 THE COURT: I will make that recommendation to
6 the Bureau of Prisons, but you understand they don't have
7 to follow my recommendation?

8 MR. DUPONT: Yes.

12:00:56

9 THE COURT: Three Rivers or San Antonio, close to
10 San Antonio?

11 MR. DUPONT: Yes, Your Honor.

12 THE COURT: Okay.

13 MR. DUPONT: Then just, for the record, my
14 objection to the reasonableness of sentence.

12:01:03

15 THE COURT: Your objection is overruled.

16 MR. DUPONT: Thank you, Your Honor.

17 THE COURT: All right. Thank you.

18 The next case is United States vs. Edgar Shakhbazyan,
19 No. H:13-367, Defendant No. 3.

12:01:10

20 MR. GERAGOS: Good morning, Your Honor. Mark
21 Geragos, G-e-r-a-g-o-s, appearing and present with
22 Mr. Shakhbazyan.

23 THE COURT: Good morning. Actually, I think it's
24 just now afternoon.

12:01:25

25 MR. GERAGOS: It's still morning in LA where I

1 came from.

2 THE COURT: That's right.

3 MR. BALBONI: Al Balboni for the United States,
4 Your Honor.

12:01:31 5 THE COURT: Good afternoon.

6 MS. FRAZIOR: Adrienne Frazior for the United
7 States.

8 THE COURT: Good afternoon. And you are Edward
9 Shakbazyan?

12:01:38 10 DEFENDANT SHAKBAZYAN: Yes, Your Honor.

11 THE COURT: In a previous proceeding you were
12 found guilty of Count 1, conspiracy to commit health care
13 fraud in violation of 18 United States Code Section 1349
14 and Counts 2 through 20, health care fraud in violation of
15 18 United States Code Sections 1347 and 2.

12:01:52

16 Mr. Shakbazyan, have you had a chance to read over the
17 presentence report that was filed in your case?

18 DEFENDANT SHAKBAZYAN: Yes, Your Honor.

19 THE COURT: And have you discussed it with your
20 attorney, Mr. Gurovich?

12:02:07

21 MR. GERAGOS: No. With myself. I substituted in
22 for Mr. Gurovich.

23 THE COURT: That's right. I am running a little
24 behind the time here. Mr. Geragos.

12:02:16

25 MR. GERAGOS: Thank you.

1 THE COURT: Mr. Geragos. Have you discussed the
2 presentence report with Mr. Geragos, your attorney?

3 DEFENDANT SHAKBAZYAN: Yes, Your Honor.

12:02:26

4 THE COURT: Do you feel you understand what is
5 contained in the report?

6 DEFENDANT SHAKBAZYAN: Yes, Your Honor.

7 THE COURT: Do you have any questions you would
8 like to ask about it at this time?

9 DEFENDANT SHAKBAZYAN: No, ma'am.

12:02:32

10 THE COURT: All right. Did you file any -- would
11 you like to make any objections to the presentence report
12 that were not made on your behalf by your attorney?

13 DEFENDANT SHAKBAZYAN: No, Your Honor.

14 THE COURT: All right.

12:02:52

15 MR. GERAGOS: From a housekeeping standpoint, why
16 don't we -- since there have been two hearings before, why
17 don't I incorporate all of the arguments except where they
18 were derogatory to Mr. Shakbazyan in terms of leadership
19 or anything else and incorporate objections. But I do
20 want to augment, if I could, in several areas. I don't
21 want to belabor all of them.

12:03:07

22 THE COURT: Okay. All right.

23 MR. GERAGOS: Obviously, you have ruled. I don't
24 think my oratory is so great that I'm going to change your
25 mind on some of those. Maybe on one or two you and I

12:03:20

1 could come to some agreement.

2 THE COURT: Well, you never know.

3 MR. GERAGOS: You never know. Right. The first
4 would be on the three levels for acceptance. Of the three
12:03:31 5 defendants standing before you today, he is the only one
6 who pled; and I understand from Mr. Balboni that that was,
7 I believe, on the day set for trial. When I looked at the
8 transcript it seems to support that.

9 My understanding from Mr. Gurovich, though, is that he
12:03:48 10 had notified Mr. Balboni before that, prior to that; and
11 that they didn't set a change of plea hearing. They just
12 came in and did it on the day of trial. Maybe that was as
13 an accommodation by Mr. Balboni for private counsel who
14 was out of town.

12:04:03 15 Then, I noticed in the objections the Government
16 objected to the paragraph having to do with the three
17 levels saying that he should only get two levels. The
18 thing that was perplexing to me is when I went back and
19 reviewed the paperwork, the original PSR, Paragraph 38,
12:04:24 20 has this quote in it that says, "According to counsel for
21 the Government a motion will be made with the Court at the
22 time of sentencing stating the defendant assisted
23 authorities in the investigation and prosecution of his
24 misconduct by timely notifying authorities of his
12:04:41 25 intention to enter a plea of guilty thereby permitting the

1 Government to avoid preparing for trial and permitting the
2 Government and Court to allocate their resources
3 efficiently."

4 That paragraph is not addressed by the addendum to the
12:04:57 5 presentence report. Instead, if you see the objections by
6 the Government, the Government objects to Paragraph 49 and
7 says "will not be filing a motion for the third point."

8 I mean, those two seem inconsistent to me. I would
9 submit to the Court that in reviewing -- and, obviously,
12:05:20 10 Mr. Balboni's recollection is going to be better because I
11 wasn't here. But I reviewed what looked to me to be the
12 Government's exhibit list in this case that was filed with
13 the Court. I didn't see anything in the exhibits that
14 looked like it pertains specifically to Mr. Shakbazyan.

12:05:40 15 So I would ask the Court humbly, of course, to give
16 him the third as having been represented in the PSR the
17 first time around before the addendum came out and
18 Paragraph 38 not having been objected to by the
19 Government. That would be the first area there, and I can
12:06:01 20 do that all at once or if you want to go back and forth
21 and let the Government respond individually.

22 THE COURT: Well, I think we better let
23 Mr. Balboni respond. He looks like he is anxious to do
24 so.

12:06:13 25 MR. GERAGOS: He does look a little anxious.

1 MR. BALBONI: Yes, Your Honor. I stay in a
2 constant state of anxiousness.

3 MR. GERAGOS: I like to say anxiety.

12:06:24

4 MR. BALBONI: Or anxiety, too. I have no
5 explanation as to why it was represented in the PSR
6 originally that I had indicated that we were going to file
7 a motion for the third point. As the Court recalls, the
8 defendant pled the morning of trial. I believe that
9 Mr. Gurovich and I reached an agreement, if you want to
10 call it that, that he was going to plead straight up to
11 the indictment. I think it was Wednesday or Thursday of
12 the week prior to trial.

12:06:42

13 Whether it's that point or the day of trial, it wasn't
14 in such a way that it saved us any time whatsoever in
15 preparing. We had to prepare as though we were going to
16 trial, including Mr. Shakbazyan, until the morning when,
17 as the Court recalls, we had a very lengthy plea colloquy
18 before we finally did reach a meeting of the minds.

12:06:59

19 And so, the United States is not filing the motion for
20 the third level reduction.

12:07:17

21 PROBATION OFFICER: Your Honor.

22 THE COURT: Yes.

23 PROBATION OFFICER: Just to clarify, that
24 paragraph is actually canned wording that goes into all of
25 our PSRs in which the defendants plead guilty and we have

12:07:27

1 not received indication that they were not -- they were
2 going to withhold the third point.

3 So that is our mistake. We should not have included
4 that. Typically, in most cases, it is -- I guess it's
12:07:47 5 just that's the way we do it. So it was not meant to say
6 that we had. It was just because most cases where the
7 defendant pleas and the offense level is higher than 16
8 the third point is given, but in this case it's not. So
9 that was probation's mistake.

12:08:05 10 THE COURT: Okay.

11 MR. GERAGOS: The problem with that is is that if
12 he relies on it in coming here on the day of sentencing
13 and it is the norm to get the third point over a 16, if I
14 am correct, I have never seen it not happen, I don't
12:08:26 15 understand why the whether it happened prior or during
16 trial why he doesn't get the three points.

17 I mean, he pled. They didn't have to have the third
18 person here. In fact, I was joking when we were off the
19 record I can't imagine why this thing took eight days to
12:08:39 20 try in the first place. Can you imagine if there was a
21 third defendant here how long this would have taken if you
22 would have added in the cross-examination, the kind of
23 pointing of fingers as we have already started to see this
24 morning and we weren't even there?

12:08:52 25 It's almost as if Mr. Shakhbazyan -- I mean, there is a

12:09:12

1 certain irony here. He did not participate in the trial.
2 He saved the Government that, having to do that. He
3 entered a plea, which I'll get to in a second, fully
4 expecting to get the three levels. Obviously, probation
5 fully expected he would get the -- or pretrial expected he
6 would get the three levels. And then to come in, you
7 know, on the day of sentencing and say, well, there was no
8 objection to that particular paragraph but to a later
9 paragraph in there. And then to say, "Whoops. We're
10 sorry." I think that that is unfair to some degree.

12:09:29

11 He clearly did not put the Government through the
12 extra hassle that I can assure you if I had been here to
13 try the case this would not have been eight days. It
14 might have been longer just because I would have had to
15 have done something, and he would have had to have done
16 something. And so, I can't imagine that that doesn't help
17 the Government or assist the Government. So that's why I
18 take issue with it.

12:09:48

19 THE COURT: I think Mr. Balboni's point is not
20 that it shortened the trial, which obviously it would have
21 or did, but that he had to prepare to prosecute
22 Mr. Shakhbazyan for however many days it took him to
23 prepare and get all his ducks in a row and things of that
24 kind and that that is what that extra point is for. The
25 extra point is for a timely plea of guilty which gives the

12:09:59

12:10:18

1 Government more time for other cases. I think that's why
2 it was not done.

12:10:45

3 I realize that that is kind of confusing, but I think
4 that the objection that Mr. Balboni made to 49 should have
5 put you on notice that there was going to be some dispute
6 about this.

7 MR. GERAGOS: Well, clearly it did. I'm not
8 saying it didn't.

12:10:54

9 THE COURT: Right. Right. I mean, it's not like
10 the day of sentencing --

12:11:12

11 MR. GERAGOS: I was struck and said I had no
12 knowledge. It was just inexplicable to me why 38 was in
13 there, and I now have an understanding about it. I still
14 don't think -- the purpose of that, according to the
15 sentencing guidelines in the third level, is so that you
16 do have more time for other cases and to assist.

12:11:24

17 Clearly they did have more time for other cases.
18 Instead of eight days it could have been 12 days or could
19 have been 10 days, whatever it would have been with a
20 third defendant there. So they do get the benefit of him
21 pleading. He does accept responsibility, and it was not
22 on -- I mean, he literally did it on the day of trial.
23 But I take Mr. Balboni at his word that they had some kind
24 of an agreement before it happened, whether it was five or
25 six days beforehand.

12:11:41

1 That gives them enough time to not have to address
2 Mr. Shakhbazyan's culpability in an opening statement, for
3 instance, to not have to deal with the closing and not
4 have to deal with other witnesses. And as I said, the
5 trial exhibit list looks to me to be kind of barren from
6 the idea of having anything specifically that pointed at
7 him.

8 So I would say given all of those factors that this
9 third point to me just seems to be appropriate in this
10 case, and I'm not suggesting that probation did anything
11 nefarious or Mr. Balboni did or anything else. I just
12 think that given the facts as we know them that the third
13 point for something that's calculated in the 20s would
14 seem to be appropriate.

12:12:31 15 MR. BALBONI: The language is fairly clear, Your
16 Honor. If it's 16 or greater and upon motion of the
17 Government stating that the defendant has assisted
18 authorities in the investigation or prosecution of his own
19 misconduct -- that did not happen -- by timely notifying
12:12:45 20 authorities of his intention to enter a plea of guilty
21 thereby permitting the Government to avoid preparing for
22 trial and permitting the Government and the Court to
23 allocate their resources efficiently, you decrease the
24 offense level by one.

12:13:00 25 There was none of that. There was no -- he didn't

1 assist us with respect to anybody else, and he did not
2 assist us with respect to any investigation or prosecution
3 of his own misconduct timely.

4 MR. GERAGOS: Except he did allocate the
12:13:17 5 resources. That's the third prong that's always the case
6 as you are allocating -- you are assisting by allocating
7 the judicial resources and assuring that in a -- from a
8 two-defendant trial that took eight days, a
9 three-defendant trial would have taken ten. That's two
12:13:34 10 full court days. Just opening and closing and
11 cross-examination alone at a very rudimentary level
12 assisted both the prosecution and the Court.

13 THE COURT: I understand your point, but I think
14 that the note is pretty clear that they are talking about
12:13:54 15 pretrial preparation as well as shortening the trial. So
16 I'm going to overrule your objection.

17 MR. GERAGOS: Okay. The second area that I
18 wanted to talk about was the idea of leader organizer, and
19 Mr. Balboni mentioned that there was quite a colloquy at
12:14:16 20 the time of the entry of the plea. And I have got the
21 transcript from October 27th of 2014, and on Page 31 -- do
22 you have it? Okay.

23 Mr. Balboni says, "Your Honor, the evidence will be
24 that Mr. Shakhbazyan was the boss. He was the manager. He
12:14:38 25 hired Dr. Barson..." blah, blah, blah. And then the

1 position is he was well aware of the entire scheme. So he
2 is responsible. If not responsible -- this is going to
3 Page 32, Lines 10 through 15. "If not responsible, he has
4 got to admit he is criminally liable for all those counts.
5 And what I heard is there is no question that four, all of
6 which there were claims." And then, they keep going with
7 the colloquy.

8 Here Mr. Balboni, who is a very experienced and able
9 prosecutor, both by reputation and by appearing in front
10 of Your Honor, used the term "manager" himself. Manager
11 has a distinct legal meaning. There is a -- as the Court
12 knows, leader organizer is at a 4 level. Under the
13 sentencing guideline manager is a 3 level. So it's a
14 another one level swing as well.

15 And the factual basis, which was somewhat, I will
16 charitably call it, tortured going back and forth finally
17 was -- and it was at Mr. Balboni's urging that he didn't
18 think it was good enough to begin with and that he wanted
19 more. And they finally got to the meeting of minds, at
20 least of Mr. Balboni and Mr. Gurovich, that it was
21 criminally liable.

22 That I don't think takes him to leader organizer, and
23 the fact that Mr. Balboni used the term "manager" I think
24 binds him in that respect. He should not be arguing now
25 for a leader organizer at an additional level. I would

1 concede, if you will, instead of the 4 level it should be
2 the 3 level for manager.

3 THE COURT: Mr. Balboni.

4 MR. BALBONI: Yes, Your Honor. I used the term
12:16:16 5 "manager" because that is factually what he was referred
6 to. He was the manager of the clinic. In no way was that
7 an argument, as we were doing a factual basis, that he in
8 fact was a manager level three points versus an organizer
9 leader four points.

12:16:36 10 In fact, the factual basis as well as the testimony
11 during the trial indicates clearly that Mr. Shakhbazyan was
12 the moving force behind this entire scam. He is the one
13 who hired Dr. Barson and agreed with him to what he was
14 going to be paid.

12:16:55 15 He is the one who instructed Dr. Barson to open the
16 Medicare, get a Medicare provider number to open the bank
17 account. He told Dr. Barson to basically turn over his --
18 the bank records -- I'm sorry, not the bank records but
19 the checkbook to him. He had Dr. Barson sign blank checks
12:17:15 20 to be used for Mr. Shakhbazyan's purposes.

21 He hired Dario Juarez as the face of the clinic.
22 There is apparently some dispute as to whether he was
23 hired as a physician's assistant or a doctor; and
24 factually, he was neither. He was the person who ran the
12:17:37 25 clinic on a daily basis. He was the person who paid the

1 marketers to bring the patients to the clinic.

2 He was the person who -- this is circumstantial but
3 the fact that Dr. Barson gave to Mr. Shakbazyan either
4 blank checks signed by him or checks made payable to Care
12:18:04 5 Manage, Inc., that those checks found their way to be
6 deposited into the Care Manage, Inc., account. So I think
7 it's reasonable to conclude that Mr. Shakbazyan was the
8 conduit for that. So he was instrumental in moving the
9 money from Dr. Barson's account to the Care Manage
12:18:24 10 account.

11 Ultimately, that money -- let me go back a second.
12 Mr. Geragos indicates in the exhibit list there doesn't
13 seem to be a lot pertaining to Mr. Shakbazyan, and he is
14 correct because Mr. Shakbazyan was clever enough to keep
12:18:40 15 his name off of almost everything. And so that's why
16 there are not a lot of records that point to
17 Mr. Shakbazyan. But nonetheless, the money, a million
18 dollars of it or so, moved from Dr. Barson's account
19 through to this Care Manage account facilitated by
12:18:57 20 Mr. Shakbazyan. Ultimately, four hundred and -- somewhere
21 around \$450,000 of the ill-gotten gain from the Medicare
22 scam went to purchase the property on Nolan Avenue in
23 California, and it's -- that property is de facto owned by
24 Mr. Shakbazyan.

12:19:20 25 So all that taken together, Your Honor, points to a

1 person who is at the top of the pyramid -- at least the
2 pyramid as we have it here in Houston, Texas. Is there
3 somebody else that's further away that may have some kind
4 of a role in this? We don't know. But the case that's
5 before Your Honor, with respect to the three defendants
6 here at trial, Mr. Shakbazyan is without question the
7 organizer and the leader in this enterprise.

8 MR. GERAGOS: This is the irony of this. He
9 pleads to the sheet, basically, is what we call it. He
10 pleads open to the entire indictment. It goes through a
11 colloquy. The Government does not have to put him on
12 trial. Yet the Government now wants to invoke what
13 happened at the trial to not only deprive him of one of
14 the points on early acceptance but in absentia use facts
15 which were developed at trial when he had no
16 representation in order to create him as this mover and
17 shaker of the -- I can assure you that if he had had
18 representation at trial that that would not have been the
19 case.

20 That we -- when Mr. Balboni says circumstantially this
21 goes to there, well, that's when he wasn't represented.
22 If he had been represented in trial there would have been
23 some explanations for what had happened here. The
24 unrefuted or unrebutted facts are he literally was not
25 even at that clinic, was out of the country for a period

1 of time and was in LA before August even ended.

2 So there is a real fundamental unfairness with the
3 idea of saying, okay, we're not going to give you a plea.
4 You are going to have to plead open to the Court, which is
12:21:04 5 what he did, that would -- so you can get any kind of
6 acceptance.

7 Now we're going to deprive you of one of the points of
8 acceptance. And now we're going to use the other two
9 defendants who, obviously, anybody who has been in the
12:21:19 10 criminal justice system knows they are going to make him
11 the bad guy in this case at the trial; and we're going to
12 use that evidence against him at the sentencing and punish
13 him, basically, for entering a plea.

14 You know, to follow along with this, he loses a couple
12:21:32 15 of more points or levels. He was better off going to
16 trial and taking up more time and putting the Government
17 to the test.

18 So to my mind it stands on its head what the
19 sentencing guidelines were trying to accomplish, which was
12:21:49 20 to encourage pleas, to encourage plea bargains, although
21 that's not the case anymore, but to encourage the idea of
22 resolving these cases.

23 And so all I would do is go back to the transcript
24 where repeatedly Mr. Balboni says, okay, so if not
12:22:07 25 responsible he has got to admit he is criminally liable.

1 Well, that's what he did. He admitted he was criminally
2 liable. We did not litigate whether he was a leader or
3 organizer. We -- he at the time accepted a very
4 accomplished trial attorney's characterization of him as a
5 manager, and words count. You know, we know the
6 difference between what a manager is and an organizer
7 leader and words count and sometimes you have got to be
8 hoisted on your own petard with words.

9 THE COURT: Well, yeah. But, I mean, I don't
10 recall what exactly Mr. Balboni represented as the facts
11 that Mr. Balboni said he could prove at the trial, which
12 is why I always ask that question; and they always can
13 tell me what they think they can prove.

14 And I am very confident that he has basically laid out
15 what he is arguing today, that Mr. Shakbazyan, you know,
16 hired the doctor, set up the whole thing, hired Mr. Juarez
17 and, you know, sat back and waited for the proceeds. And
18 to me that's -- that's an organizer at the very least.

19 MR. GERAGOS: Well, except that he did on Page
20 31, Line 25 say he was the manager --

21 THE COURT: He said he was the boss --

22 MR. GERAGOS: Yeah. He hired --

23 THE COURT: -- and he was the manager. And
24 that's the role he played. He was managing that clinic.
25 But that -- but he also was the organizer of the clinic.

1 He founded the clinic.

2 MR. GERAGOS: We're not alleging that any more
3 than Dr. Barson did that Mr. Shakbazyan sat down at the
4 computer terminal, entered the false billing. That's not
5 the position.

12:23:57

6 The position is he was well aware of the entire
7 scheme, which included the types of billing that we're
8 going to be doing, because that was his job. That's why
9 he was sent there to set the clinic up. So he is
10 responsible. If not responsible, he has got to admit that
11 he is criminally liable. Blah, blah. And that is -- that
12 is the colloquy. That was after --

12:24:09

13 THE COURT: We don't sentence people by what they
14 admit they did.

12:24:26

15 MR. GERAGOS: Well, we do have to --

16 THE COURT: We sentence people by what the
17 factual basis is.

18 MR. GERAGOS: The basis. I agree.

19 THE COURT: The factual basis was established at
20 the plea colloquy and at the trial. I mean, the evidence
21 was at the trial.

12:24:35

22 MR. GERAGOS: Right. But the trial can't in --
23 you can't gin it up for him in absentia at a trial he
24 wasn't represented at.

12:24:50

25 THE COURT: Well, I don't think that's the way it

12:25:06

1 works. I doubt very seriously that the Fifth Circuit
2 would agree with you on that because we can take into
3 account all kinds of factual things, and it is
4 preponderance of the evidence. It's not beyond a
5 reasonable doubt, which is what the jury found. So, I
6 mean, it's like it gets pretty loosened up by the time you
7 get to the sentencing phase.

12:25:22

8 And what appears on the record as the facts of the
9 case are just the facts of the case. And you can't
10 because Mr. Balboni misused a word or a slip of the tongue
11 or was not being precise enough, I can't just ignore that.
12 I have to look at the whole picture.

13 MR. GERAGOS: Right. I understand.

14 THE COURT: The 10,000 miles up.

12:25:40

15 MR. GERAGOS: I like to see the 30,000-foot view.
16 I don't know. Mr. DuPont flies at 10,000. I feel a lot
17 safer at 30,000 feet.

12:25:57

18 The problem is, though, it comes back to the first
19 argument. I understand that you can use, you know, a wide
20 expanse of items; but the problem is where -- what is the
21 point? At a certain point we undercut the very rule for
22 pleading.

12:26:17

23 THE COURT: Well, I'll tell you I was very
24 disappointed when he pled. I wanted to see -- I wanted to
25 see the trial. I was very disappointed that he pled. So,

1 to me, a plea there are lots of reasons for pleading
2 guilty. One of them is you get a better deal. But under
3 the sentencing guidelines and the structure of that whole
4 thing, it's not to encourage -- the number one thing is
12:26:38 5 not to encourage pleas, obviously, because you don't get
6 the kind of plea you get in State Court. There is a whole
7 lot more put on a Federal defendant than on a State
8 defendant. You know, I just don't accept that I'm
9 supposed to jump over all these things because he entered
12:26:56 10 a plea of guilty.

11 MR. GERAGOS: Well, it's not so much you have got
12 to jump. If the suggestion is that you have got to
13 ignore, I don't want to misspeak or suggest that. But
14 it's that if you are going to be -- maybe I'm disappointed
12:27:12 15 as well he didn't go to trial. I would have liked to have
16 tried this case.

17 The problem is, though, that he is being penalized for
18 entering the plea; and that's -- I'm not asking you to
19 ignore anything. But there is a penalty to that because
12:27:27 20 all you heard was facts developed before you that had no
21 input from him. The legal concepts of whether it's res
22 judicata or collateral estoppel would fail in this case
23 because you couldn't bind him on a civil level. If we
24 were in a civil case you could not argue that he was bound
12:27:49 25 under res judicata or collateral estoppel.

1 So it would seem to me to be somewhat of a problem in
2 a criminal sentencing case to say we're going to bind him
3 under the same principle of res judicata or collateral
4 estoppel in a criminal sentencing when he pled or he
5 wasn't represented in the criminal trial. That's the
6 conundrum.

7 I understand your position. You sat here for eight
8 days. You heard the evidence. You obviously have a view
9 of this case.

10 THE COURT: And I read the indictment.

11 MR. GERAGOS: Correct.

12 THE COURT: And I also participated in the plea
13 -- in Mr. Shakbazyan's plea and heard Mr. Balboni tell me
14 what he thought he could prove against Mr. Shakbazyan. I
15 mean, all of that is pretty consistent.

16 MR. GERAGOS: Well, I would say that the plea and
17 the factual basis are more consistent with what I am
18 arguing than what Mr. Balboni is; and I read it. I didn't
19 sit here for the eight days of the trial. So I have got
20 pieces of witnesses and transcripts that I have looked at.

21 But I come back to the same problem. It shouldn't
22 be -- he shouldn't be penalized for a standard that's
23 being imposed where the facts developed at a trial where
24 he wasn't represented are going to be used against him
25 because I don't think that, oh, a lot of the facts I have

1 heard this morning are anywhere near where they would have
2 been if he had had representation or if he had
3 participated in the trial. I guess that's my point.

12:29:18

4 THE COURT: All right. You make a good point,
5 but I don't buy it.

6 MR. GERAGOS: Okay.

7 THE COURT: I'm going to overrule your objection.

12:29:28

8 MR. GERAGOS: Then I would like to augment,
9 also -- I put it in the paperwork. I haven't heard
10 anybody argue it orally -- the number of victims. Also,
11 he pled to the indictment. The number of victims is less
12 than ten in the indictment, with Medicare being counted as
13 one and talking about the -- under the theory of the
14 unindicted co-conspirators. Under the victim enhancement
15 you do not get the others.

12:29:45

16 All he pled to is only factual basis. There is
17 nothing that gets them to the victim enhancement. I
18 understand they want to use things that were developed at
19 a trial that, once again, I wasn't at the trial. He pled
20 to the indictment. The indictment only lists eight.
21 Their benchmark, so to speak, that they have got to hop
22 over is 10. And so I would ask that the Court also
23 overrule that in the victim enhancement as well.

12:29:59

24 THE COURT: Mr. Balboni.

12:30:17

25 MR. BALBONI: Yes, Your Honor. He pled guilty to

1 the indictment. The indictment charged that all of it was
2 fraud. The indictment charged that 429 beneficiaries were
3 seen. \$2.1 million was billed. \$1.182 was paid. It was
4 all fraud either because it was not provided or because it
5 was not reasonably -- or was not medically necessary.

6 And so the victims, if we want to limit the Court,
7 which I don't believe is true or is right, but if you want
8 to limit it just to the record then the record supports
9 that Mr. Shakhbazyan in his plea colloquy agreed to the
10 indictment. And, therefore, he has agreed to the fact
11 that there were 429 victims.

12 MR. GERAGOS: Well, if that's how it is
13 calculated, that's the problem. The indictment
14 specifically on Page 5, Subsection 16, says, "Defendants
15 Barson and Juarez would and did cause Medicare to be
16 billed for procedures involving 429 patients over 39 days
17 over a two-month period."

18 Then the subsequent portion of the indictment -- and
19 this is yet another problem that I found with some of the
20 arguments that I heard this morning. The Counts 2 through
21 20 specifically say, "Beginning in or about 2009." And
22 that's at Page 7, Subsection 2, under Counts 2 through 20.
23 And says under sub (d), health care fraud, "Beginning in
24 or about June 2009 and continuing thereafter to in or
25 about August 2009."

1 So as far as everything goes -- and this leads into
2 the one other objection I wanted to make. As far as
3 everything goes in terms of utilizing the November
4 application, November 1st, 2009, Counts 2 through 20 and
5 21 are on their face of the indictment limited to the
6 August 2009 date. So there is clearly ex post facto. The
7 problem that they have is the way the indictment is
8 drafted up is they have got on the first count of the
9 conspiracy they have that February date of 2010, which
10 applies to Count 1, the object of the conspiracy, the
11 manner and the means; and they specifically have 2010.
12 But for Counts 2 through 20 it's only through August 2009.
13 Clearly for Counts 2 through 20 those are ex post facto.

14 So we have got that additional problem that they are
15 at odds with one another and that they can't apply the
16 November 1st -- because it obviously didn't go into effect
17 until then -- the November 1st, 2009 sentencing guideline
18 because that would clearly be ex post facto as well.

19 MR. BALBONI: But we have the conspiracy count,
20 Your Honor, which covers all of the conduct and it starts
21 and it ends -- I'm sorry. It starts in 2009 and ends
22 February of 2010, which is the argument earlier.
23 Therefore, under the guidelines, we are -- the Court is in
24 the proper guideline 2009. The Court is to use one
25 guideline only. In this case it's 2009. It would be ex

1 post facto as it relates to Counts 2 through 20, as
2 Mr. Geragos points out; but as to Count 1 it, in fact, is
3 not ex post facto. And so the calculation would not
4 change.

12:34:08 5 MR. GERAGOS: That's the problem. The object of
6 the -- it's a conspiracy to commit 18 U.S.C. 1349. That's
7 what the Count 1 is.

8 The actual substantive offenses are 18 U.S.C. 1347,
9 Counts 2 through 20. You cannot allege that the health
12:34:30 10 care fraud took place, which they do and which the grand
11 jury found, from June of 2009 to August of 2009 and in
12 addition in your Count 1 where you have got the conspiracy
13 say that it took place over 39 days, which perfectly gels
14 with what the substantive counts are, and then say, well,
12:34:54 15 even though we have got a conspiracy -- we have got the
16 actual substantive counts, which are barred and I believe
17 I hear him correctly agreeing with me, Mr. Balboni
18 agreeing with me, you are barred from using the November
19 2009 sentencing guidelines for Counts 2 through 20. Their
12:35:12 20 argument is because of Count 1 having the February date
21 that you can use it, but you can't unless you are just
22 using it as to Count 1.

23 I would suggest -- and I have looked all over for
24 this. I have never seen a split indictment like this
12:35:27 25 where the conspiracy covers a different period of time

1 than the actual substantive offenses. But in any event,
2 clearly you can't use the November 1st, 2009 for anything
3 that happens on Counts 2 through 20. If that's the case,
4 then you can't -- it may -- I guess it begs logical sense.

12:35:48 5 How could you ever parse what you are using for Counts
6 2 to 20 versus what you are using for Count 1 if they are
7 asking you for somebody who pled open in the case, who did
8 not go to trial, they are asking you now to kind of
9 bootstrap Count 1 into Counts 2 through 20. I just don't
10 think you can do that.

11 That would be the -- I guess the most analogous form
12 would be if somebody committed different offenses over a
13 period of time, Counts 1 through 20, some barred by the
14 statute of limitations and they say, "Well, here is a
12:36:25 15 conspiracy count. We're going to revive the substantive
16 counts that have already been barred by the statute." You
17 can't do that. So why would you be able to do it in an ex
18 post facto way here?

19 Because if you could do that, then there would never
12:36:39 20 be any problem with ex post facto. All you would have to
21 do is just allege the conspiracy that leap frogs the
22 statute of limitations take.

23 And so, based on that I would ask the Court to use the
24 appropriate guideline for the one the Government conceded
12:36:53 25 is appropriate to Counts 2 through 20, which are the

1 lion's share if not 95 percent of the counts that my
2 client pled to.

3 MR. BALBONI: Your Honor, again, the -- first of
4 all, I think it's important to note if what Mr. Geragos
12:37:10 5 says we skipped over, we hopped over the magic line, if we
6 just had a charge of conspiracy and didn't prove anything
7 post November 1st of 2009; but in this case we had at
8 least one payment directly from -- I believe it was Care
9 Manage?

10 MS. FRAZIOR: Uh-huh.

11 MR. BALBONI: To Dr. Barson supposedly allegedly
12 for payment of taxes related to the W-2 or the 1099 he
13 received that laid out for or accounted for all of the
14 Medicare money that had been -- they thought Medicare
12:37:49 15 thought had been paid to Dr. Barson. He was in contact
16 with Mr. Shakbazyan. And then, it was because of that
17 that the conspiracy extended to February of 2010 because
18 it was still ongoing at that point in time.

19 And so, I don't think Mr. Geragos' argument takes into
12:38:12 20 account that factor that, in fact, it is not just a date
21 that was picked in the future. It was actually the last
22 time, the end, if you will, of the conspiracy, which was
23 the payment of that somewhere around \$10,000 to
24 Dr. Barson.

12:38:28 25 MR. GERAGOS: Right. But the problem is that you

1 have got, by my calculation, 19 counts of the 20-count
2 indictment, substantive counts, which say -- specifically
3 say that beginning in or about June 20th of '09 and
4 continuing thereafter to in or about August 20, '09 in the
12:38:51 5 Houston Division of the Southern District. And we have
6 somebody who pled open based upon an indictment that is
7 self-limiting on its very terms.

8 There is nothing in -- I just looked to see.
9 Mr. Balboni was mentioning it. There is nothing here --
12:39:13 10 if I could just have one moment, Your Honor.

11 THE COURT: Sure.

12 MR. GERAGOS: -- that says, like I mentioned
13 before, 39 days over a two-month period, June, July,
14 August, which is what the substantive was. A high of 156
12:39:31 15 patients in July. There is \$1.2 million to Barson's Wells
16 Fargo account, which I think they would concede is also
17 before August, and an unindicted co-conspirator on April
18 28th, 2009 from -- the only thing that they have got is
19 G.A., an unindicted co-conspirator, would and did wire
12:40:01 20 \$9,700 from the Care Manage BOA account to Defendant
21 Barson on February 19th of 2010.

22 Now, none of that is listed. None of those
23 allegations are contained in the substantive. And what
24 they are asking you to do is sentence him on 19 of 20
12:40:21 25 counts which they concede are barred from using the

1 November 1st. But somehow because Count 1 -- which I
2 would suggest is infirm on its face. But other than that,
3 Count 1 can't revive Counts 2 through 20. There is no
4 such -- I mean, there is no principle in the law where an
5 ex post facto application to particular counts can be
6 revived by an allegation of another count. That just is
7 not in the law. It's never been ex post facto.

8 And that was one of the reasons we had a revolution
9 against the king because the king did that. They came
10 after you, and they kept saying there was not going to be
11 any end to this. That's why we eliminated writs of
12 assistance. That's why we have statutes of limitation.
13 That's why we have double jeopardy and things of that
14 nature. That's why we created ex post facto.

15 So while I applaud Mr. Balboni and he has proved
16 everything I've said about him in terms of being a very
17 able and clever lawyer, he is not able to have the Court
18 sentence my client under the 2009 November 1st guidelines
19 because clearly they do not apply to Counts 2 through 20.

20 MR. BALBONI: Your Honor.

21 THE COURT: Yes.

22 MR. BALBONI: This case could have been charged
23 with just the conspiracy. There is no requirement that we
24 charge substantive counts, but we did. And so now we have
25 to live with it.

1 That doesn't change the analysis however. The
2 conspiracy count stands on its own, and it has a specific
3 beginning date and ending date. The ending date brings us
4 past the effective date of the victim definition that
5 we're talking about here.

12:42:05

6 The -- I lost my train of thought for a second. The
7 difference between the dates in the conspiracy versus the
8 health care fraud substantive counts is because, as the
9 Court knows, the crime of health care fraud occurs at the
10 time that the false claim is filed. It's not a
11 conspiracy. It's more like a bank fraud, if the Court
12 remembers those days. It's every individual false claim
13 is a completed crime unto itself.

12:42:24

14 And so, that is why the scheme of years or the months,
15 I should say, of the scheme differ between the health care
16 fraud substantive accounts and the conspiracy to commit
17 health care fraud.

12:42:46

18 With respect to the substantive health care fraud
19 counts it's the filing of the false claim that is the
20 crime. And so the filing of the false claims occurred
21 through August of 2009. That doesn't mean the conspiracy
22 ended in August of 2009. So that is why you have two
23 different sets of dates. One for the conspiracy that
24 swallows up, if you will, the actual physical false
25 statements made to Medicare.

12:43:02

12:43:20

1 MR. GERAGOS: Well, I agree that all the false
2 statements were made and ended in August. In fact, on
3 Page 9 of the indictment they list the 20 instances. All
4 20 instances are between the date of June 30th and August
5 5th of '09.

12:43:40

6 And then you move into Count 21. That's a conspiracy
7 to violate the Anti-Kickback Statute. And that is
8 specifically against my client. And once again, the
9 conspiracy as alleged to my client is beginning in or
10 about June, 2009, the exact time being unknown, and
11 continuing thereafter to or in or about August of 2009.

12:43:59

12 So we now have once again -- I didn't realize it until
13 I looked again at Count 21 -- yet another affirmation of
14 the fact that the conspiracy that they allege my client is
15 involved in ended in August 2009. They have listed the
16 false claims dates ending August 5th, 2009; and they can't
17 revive or swallow up, as they say, the conspiracy to the
18 other counts. It is just there is no legal basis for
19 that.

12:44:18

20 I don't understand. I mean, I know they posit it; but
21 they can't undue 200 years of ex post facto law by saying
22 we've got a conspiracy over here. And so, therefore, we
23 want you to ignore the other 21 counts or the other 20
24 counts over here which are -- you're supposed to use under
25 a separate sentencing guideline.

12:44:35

12:44:55

1 That just doesn't make sense; and there is no legal
2 authority for it, that I'm aware of.

3 THE COURT: I don't know that there is any
4 authority for using two different guidelines.

12:45:15 5 MR. GERAGOS: It was one of the things I searched
6 for. I admit to --

7 THE COURT: I don't believe there is. I don't
8 think they ever used two. I don't think they ever do.

9 PROBATION OFFICER: In the application under the
12:45:27 10 guidelines it says that you use the last date of the
11 offense of conviction as a controlling date for the ex
12 post facto purpose. In this case he pled to the
13 conspiracy, which ended when we are in the 2009 guideline
14 manual. That is what puts him in the 2009 guideline
12:45:45 15 manual.

16 MR. GERAGOS: That's only for Count 1. It does
17 not apply to Counts 2 through 21.

18 PROBATION OFFICER: That is an offense of
19 conviction, which widens our data range.

12:45:56 20 THE COURT: It widens the dates.

21 MR. GERAGOS: What?

22 THE COURT: The offense of conviction which
23 widens the date. The way the guidelines work is you take
24 the last date of a count of conviction. Well, the last
12:46:08 25 date of Count 1 is February of 2010, which puts you in the

1 2009 guidelines.

2 MR. GERAGOS: Right. For that -- for that count.

3 THE COURT: No, not for that count. It's all the
4 counts that they were found guilty of. They go through
5 all the counts. The last date, that happens to be
6 conspiracy. So you use that for all of the counts.

7 MR. GERAGOS: If you had no ex post facto
8 ramifications. That's the problem.

9 THE COURT: Well, I don't believe that there are
10 ex post facto ramifications because it's my understanding
11 -- and if I am wrong, I want you to tell me -- this
12 definition of "victim" was in the 2008 -- I mean, they
13 used the term "victim" in 2008. Some courts were saying
14 victims were the beneficiaries, and some courts weren't.
15 So they just decided to clarify. Isn't that what they did
16 was they just clarified what a victim was? Am I wrong
17 about that?

18 PROBATION OFFICER: I don't know if that's the
19 case. I know that the definition was expanded in the 2009
20 manual.

21 MR. GERAGOS: Right.

22 PROBATION OFFICER: Like I said, the application
23 note is specific for ex post facto purposes. The last
24 date of the offense of conviction is the controlling date.

25 The last date -- he did plead to the conspiracy that is

1 one of the offenses of conviction.

2 MR. GERAGOS: Right here. I have got it on Page
3 12 of our sentencing memo. The Fifth Circuit expanded --
4 this is where we are arguing that the expanded victim
12:47:45 5 definition eliminates a defense. Prior to the amendment
6 the Fifth Circuit found that the guidelines definition of
7 "victim" does not include individuals who are reimbursed
8 by an entity in a fraud scheme. That was *United States*
9 *vs. Conner*, 537 F.3d 480 at 492. That was 2008. Finding
12:48:07 10 account holders were not victims under the sentencing
11 guidelines because they were reimbursed for losses by
12 credit card companies.

13 Now, here the only evidence that we have seen either
14 at trial, that I'm aware of, is that Medicare sustained
12:48:22 15 the pecuniary loss. So under their holding in *Conner* that
16 would exclude the patients from being classified as
17 victims. The amendment eliminated *Conner*, the *Conner*
18 holding of the Fifth Circuit.

19 That's why this argument is so apropos as we sit here
12:48:43 20 in the Fifth Circuit and why the analysis is not the
21 analysis that's proposed to you by probation or pretrial
22 because that counts as to Count 1. That does not count as
23 to Counts 2 through 21 and the date of offense of
24 conviction. I agree. Count 1 you have -- you apply one
12:49:05 25 sentencing guideline. But in order to try to expand that

1 to Counts 2 through 21 you can't do it because under the
2 law in *Conner* it ruled that that would -- it would
3 eliminate the defense that was articulated in *Conner*. And
4 frankly, I think that's why they did the change on
5 November 1st because of a lot of these Medicare
6 prosecutions. That's my supposition.

7 But that's the problem that I think you articulated is
8 how can I use two sentencing guidelines? And then, I
9 think that gets you to what you remember from law school
10 they called the Rule of Lenity. And when you have got --
11 when you are on the heels of one of these statutory
12 constructions, you don't go -- you don't lean towards the
13 Government. The old Rule of Lenity is you have to err on
14 the side of the defendant.

15 THE COURT: Well, let me ask you this: This case
16 you cited from the Fifth Circuit was the Judge overruled?
17 Did the Fifth Circuit -- did the Fifth Circuit reverse the
18 District Court because the District Court counted the
19 credit card holders as victims?

20 MR. GERAGOS: That's a good question. I don't
21 remember the -- the Fifth Circuit holding was as you said.
22 I don't remember off the top of my head if the trial court
23 ruled. I would assume they did, but I don't know. I
24 don't want to just -- I don't want to guess.

25 MR. BALBONI: Your Honor, in *Conner* these were

12:50:48

1 victims of credit card fraud. As we all know, the credit
2 card companies reimburse their card holders for fraud that
3 they are not a party to. I can't -- and I apologize for
4 not having a case off the top of my head. But the Court
5 began to talk about the fact that there is Fifth Circuit
6 precedent that victims -- I'm sorry, that Medicare
7 beneficiaries are, in fact, victims under the old
8 definition because they do suffer harm in that their
9 benefits are being used up by operations such as

12:51:10

10 Mr. Shakhbazyan's.

12:51:26

11 They only have so many -- and this doesn't apply in
12 this case, but in situations like with the power
13 wheelchairs. If they were -- as far as Medicare was
14 concerned, they got a powered wheelchair when they didn't
15 need it and Medicare not knowing that. Three years later
16 they do need it; and when they try to get it, Medicare
17 says, "I'm sorry. You already have one."

12:51:40

18 In this instance we don't have something that clear
19 cut; but what we do have is we have, as I said, there is
20 only so many -- they are only entitled to so many
21 different types of services per year under the plan of
22 allowance. And because those services were being used up,
23 at least based on the claims being filed by the Barson
24 Clinic, they do actually suffer harm even though money
25 doesn't come directly out of their pocket.

12:52:00

1 MR. GERAGOS: I'm not familiar with which case --
2 and I looked at most of these cases before today -- he is
3 referring to; and I did not -- that holding would, if
4 there is that holding in the Fifth Circuit, it would have
5 to be post *Conner* because *Conner* is the Fifth Circuit case
6 that was decided in 2008 and which, I believe, was the
7 precedent for them changing the guidelines.

8 So I don't know if Mr. Balboni is referring to a post
9 '09. I'm assuming that's what must have happened. It's
10 got to be conduct that was post November 1st, 2009,
11 because otherwise the Fifth would have been directly at
12 odds with one another and with *Conner* specifically.

13 MR. BALBONI: I believe it predates *Conner*, Your
14 Honor. I don't know that it is at odds, again, because
15 it's really two different scenarios. One, you have credit
16 card holders who are literally being reimbursed for any
17 losses they may have suffered by the fraudulent use of
18 their cards as opposed to what I just described with
19 respect to Medicare beneficiaries.

20 THE COURT: Do you have any idea what the name of
21 that case would be?

22 MR. BALBONI: Not off the top of my head, Your
23 Honor. No. I apologize.

24 MR. GERAGOS: Could I show counsel something?

25 THE COURT: Sure.

1 (Sotto voce discussion between counsel.)

2 MR. GERAGOS: I cited another case which was also
3 Fifth Circuit which was *United States vs. Gieger*,
4 G-i-e-g-e-r, 190 F.3d at 661, 664 and 665. They found
12:54:01 5 there that the patients were not victims where the scheme
6 to submit false claims for ambulance services provided
7 them a free hospital ride; and if they suffered no medical
8 or financial harm, they can't be considered victims of a
9 medical fraud scheme.

12:54:16 10 So those are the two citable cases that are published
11 that I think deal with this directly head-on. Absent some
12 case law other than that, I think the Court is, you know,
13 Your Honor, is bound under the applicable Fifth Circuit
14 law on the issue of this six level enhancement.

12:54:38 15 THE COURT: Well, let me ask you this: Are you
16 willing to concede that -- I believe -- I mean, I don't
17 have any documents before me. So I don't know what it
18 says, but I know that -- I mean, I believe that the first
19 count, which is the conspiracy count, and it talks about
12:55:06 20 the 400-and-some-odd victims.

21 MR. GERAGOS: It does. It does. It talks about
22 400 -- specifically, it talks about 429 patients were --
23 or Medicare was billed for 429 patients in 39 days or
24 something like that.

12:55:24 25 THE COURT: And that was the object of the

1 conspiracy?

2 MR. GERAGOS: Well, it's interesting --

3 MR. BALBONI: I believe this is manner and means,
4 Your Honor.

12:55:31 5 MR. GERAGOS: Yeah. I was going to say the --
6 what -- it isn't listed in the -- they call it the manner
7 and means and say, "Did cause Medicare to be billed for
8 procedures involving 429 patients over 39 days over a
9 two-month period."

12:55:51 10 The problem with that is that the Counts 2 through 20
11 which are -- incorporate the Paragraphs 1 through 6 of
12 Section A are self-limiting, as well. So that is -- you
13 can't bootstrap it. You can't use one sentencing
14 guideline for the Count 1 and a different guideline for
12:56:17 15 counts --

16 THE COURT: That's my point. I mean, Count 1
17 definitely includes the 429 victims.

18 MR. GERAGOS: Except they don't characterize them
19 as victims. It's submissions. I mean, that's the --

12:56:31 20 THE COURT: Okay. All right.

21 MR. GERAGOS: That's where the problem is.

22 THE COURT: But the 2009 guideline which governs
23 the conspiracy count for sure defines "victims" as these
24 patients whose Medicare benefits were used.

12:56:49 25 MR. GERAGOS: Correct.

1 THE COURT: Okay. So suppose I'm sentencing
2 Mr. Shakhbazyan and I decide that he should be sentenced to
3 whatever, you know, and I give him that sentence as to
4 Count 1.

12:57:06 5 MR. GERAGOS: What do you do with Counts 2
6 through 21?

7 THE COURT: Well, I could do anything I wanted to
8 with Counts 2 through 21 --

9 MR. GERAGOS: Post *Booker* you can --

12:57:15 10 THE COURT: -- because of the sentence he gets
11 for Count 1, right?

12 MR. GERAGOS: Post *Booker* you can do anything.
13 It's come full circle.

14 THE COURT: Well, I realize that I could do
12:57:23 15 anything; but I'm trying to be reasonable about this.

16 MR. GERAGOS: That's what -- I mean, in thinking
17 it through, that was one of the things that I had thought
18 about. I mean, you know, far be it from me to be so
19 presumptuous as to tell you how to sentence someone. I'm
12:57:39 20 here to suggest and point out what I think are problems,
21 but that I think -- the problem with that is that if you
22 have -- I go back to that Rule of Lenity.

23 If he would have received a lesser sentence six levels
24 lower on Counts 2 through 21 and just by application of
12:58:02 25 the later sentencing guideline he gets the higher because

1 of six levels -- I mean, six levels is huge.

2 Under the Rule of Lenity is that a problem? Are we
3 just taking what's a fundamental problem and escalating it
4 and violating a basic rule of statutory construction, this
5 Rule of Lenity?

12:58:22

6 MR. BALBONI: Your Honor, maybe -- I think this
7 is where the Court is going. I mean, a practical
8 application of the 2009 guidelines would be the entire
9 guideline being applied to Count 1 including the expanded

12:58:40

10 definition of "victim." You would get, as the Court
11 pointed out, you would get your guideline range for that
12 particular sentence. And then, you would continue to use
13 the 2009 guideline for the rest of the counts; but you
14 would just not use the enhanced definition because of the
15 potential ex post facto problem. I think because of the
16 grouping you are ultimately going to get to the same
17 place.

12:59:00

18 THE COURT: Get to the same place, yeah.

19 MR. BALBONI: Right.

12:59:11

20 MR. GERAGOS: I think the second step --

21 THE COURT: What you want me to do is use the
22 2008 guideline for Count 1?

23 MR. GERAGOS: Correct. Or to sentence under the
24 2008 guideline for one of the other counts, and that's why
25 I keep bringing up the Rule of Lenity. I don't -- I wish

12:59:29

1 I had a case that I could point you to that would say we
2 can pick and choose the guidelines that are appropriate.
3 I just don't think there is one.

12:59:45

4 THE COURT: Yeah. I wish you could, too. I
5 don't think that's how it works.

12:59:56

6 MR. GERAGOS: I tend to agree with you.
7 Logically, it doesn't make a whole lot of sense. Why do
8 we go through all of these machinations and advanced
9 physics and geometry with the guidelines and then say,
10 "Well, okay. Here is the Euclidean, and here is the
11 pre-Euclidean." It doesn't make a whole lot of sense.
12 I'm with you on that.

01:00:11

13 But, obviously, I think if there is a more enhanced
14 version or a less Draconian version then I think under
15 statutory construction you take the lesser.

16 THE COURT: I'll tell you what. I now know why
17 the Ninth Circuit rules as it does on many cases. It's
18 because of eloquent people like you.

01:00:25

19 MR. GERAGOS: I don't know that I would take that
20 as a compliment.

21 THE COURT: We are just arguing about something
22 that I don't think, for me, there is any solution but to
23 just come down one way and let you appeal it.

24 MR. GERAGOS: I hate to do that to you.

01:00:37

25 THE COURT: Oh, I know. I know. You don't have

1 any kind of plea agreement that says he can't appeal my
2 sentence. So you are welcome to do that. You are very
3 welcome to do that. We'll solve this problem.

4 PROBATION OFFICER: (Standing.)

01:00:47

5 THE COURT: Yes, ma'am.

6 PROBATION OFFICER: I just thought maybe for some
7 clarification -- I know he is trying to find a guideline
8 level that is lower. However, the grouping rules do say
9 even if we were to look at both of the counts separately,
10 you pick the guideline that results in the highest offense
11 level for sentencing purposes. So we would still be in
12 the 2009 guidelines.

01:01:00

13 MR. GERAGOS: Right. Except that still presents
14 you with the ex post facto problem.

01:01:13

15 THE COURT: Well, that's something that probably
16 hasn't -- nobody in the Fifth Circuit has probably taken a
17 look at in a long time.

18 MR. GERAGOS: I would agree with you because I
19 can't find anything. I can't find anything in any Circuit
20 where anybody has had it.

01:01:23

21 THE COURT: Right. So I'm going to overrule that
22 objection and find that the 429 individuals were victims.
23 I don't even know where we are now.

24 MR. GERAGOS: I want to say that was the last
25 other than the ones I incorporated by reference.

01:01:40

1 THE COURT: You incorporated by reference the --
2 you have got the amount of restitution which you have
3 incorporated?

4 MR. GERAGOS: Correct.

01:01:54

5 THE COURT: Which I believe that was one that you
6 incorporated.

7 And you also objected to Paragraph 40, which goes back
8 to the grouping thing?

9 MR. GERAGOS: Correct.

01:02:11

10 THE COURT: And 43 you have already argued about.
11 43 is the loss calculation and which is a variation of the
12 restitution.

13 MR. GERAGOS: Correct. And then 44 is the one we
14 just talked about.

01:02:28

15 THE COURT: Right.

16 MR. GERAGOS: 46 we have already dealt with.

17 THE COURT: We have dealt with that one.

18 MR. GERAGOS: This is a different -- a slightly
19 different argument. I would just incorporate that

01:02:38

20 argument into what I had made before because that was
21 where --

22 THE COURT: All right.

23 MR. GERAGOS: It's in my paperwork. So I don't
24 need to belabor that.

01:02:44

25 THE COURT: Right.

1 MR. GERAGOS: And then 48, 50 and 52 is they have
2 noted it. The probation officer maintains the
3 calculations as amended are both applied appropriately and
4 calculated is the response. So I would incorporate that
5 criminal history unless you want me to be heard on that.

01:03:03

6 THE COURT: Well, I mean, I need you to touch on
7 all of the objections before I can do anything else.

8 MR. GERAGOS: I think everything else has been
9 dealt with in the paperwork. I don't need any further
10 argument.

01:03:17

11 THE COURT: Any further argument?

12 MR. GERAGOS: Right. And when I said
13 incorporated, not only the paperwork but arguments by
14 co-counsel and codefendants.

01:03:26

15 THE COURT: Right. Yeah. All right. Well, I
16 believe that the objection to Part C, offender
17 characteristics, I believe I'm going to have to overrule
18 all of those.

19 And then you objected and said that the factors may
20 warrant departure, which I don't think there is going to
21 be an objection. So I don't think I need to rule on that
22 one.

01:03:46

23 All right. Having addressed all your objections
24 incorporated from the arguments of counsel or presented
25 here in the paperwork, I am going to overrule all those

01:04:01

1 objections, adopt the presentence report and the addendum
2 as my own, both the findings of fact and application of
3 the guidelines to the facts and find the total offense
4 level of 3, criminal history category Level 1, which gives
5 a guideline provision range of 97 to 121 months.

01:04:21

6 All right. Anything else that you would like to say?

7 MR. GERAGOS: No, Your Honor. I have taken up a
8 lot of your time. I have gone into your lunch hour. I
9 appreciate your patience, and I would just ask that the
10 lower -- I'll submit it. I'll let you do -- I think you
11 have made up your mind. I'll let you sentence him as you
12 feel appropriate.

01:04:39

13 THE COURT: All right. Thank you. Mr. Balboni.

14 MR. BALBONI: Yes, Your Honor. We, of course,
15 would also like you to sentence him to what you believe to
16 be appropriate. We would like to suggest, Your Honor,
17 that given this defendant's role in this offense that he
18 be sentenced at the top end of the guideline minus a month
19 for a total of 120 months thereby not having to deal with
20 the stacking.

01:04:51

01:05:18

21 THE COURT: Yes.

22 MR. GERAGOS: Well, here I thought Mr. Balboni
23 was just going to submit. I can't imagine -- I can't
24 imagine that for somebody who comes in and accepts
25 responsibility and doesn't put the Government through

01:05:32

1 their paces that that makes any sense. I would urge the
2 Court to do the low end of that, given all the issues that
3 we have raised or that there are related to this.

4 THE COURT: Okay.

01:05:51

5 MR. GERAGOS: I submit.

6 THE COURT: Mr. Shakbazyan, anything you would
7 like to say to the Court before I pronounce sentence?

01:06:02

8 DEFENDANT SHAKBAZYAN: Yes, Your Honor. First of
9 all, I'd like to apologize to Mr. Balboni; and I would
10 like to apologize to you, Your Honor, for my role in this
11 clinic. And I also want to thank my pretrial officers,
12 Officer Corona and Officer DeGonia, for their
13 psychological and mental help to get me through my
14 situation that I have here. And again, I'm sorry for my
15 actions.

01:06:27

16 THE COURT: Anything else before I pronounce
17 sentence?

18 MR. BALBONI: No, Your Honor.

19 MR. GERAGOS: No.

01:06:35

20 THE COURT: Edgar Shakbazyan is before the Court
21 this afternoon for sentencing after pleading guilty to one
22 count involving conspiracy to commit health care fraud, 19
23 counts of health care fraud, and one count of conspiracy
24 to violate the Anti-Kickback Statute.

01:06:48

25 He is identified as the manager of the clinic, who

1 along -- manager but actually organizer of the clinic, who
2 along with the co-conspirators participated in a scheme to
3 defraud Medicare. Mr. Shakbazyan is identified as an
4 organizer, leader, manager, supervisor in this conspiracy
5 which involved giving directions to five or more criminal
6 participants including but not limited to Dennis B.
7 Barson, Jr.; Dario Juarez; Amber Wheeler; Pamela Devore;
8 Percy Bates; Frank Montgomery and G.A.

9 Through the use of Dr. Barson's Medicare provider
10 number Shakbazyan utilized the personal and identifying
11 information on at least 429 beneficiaries to submit
12 unauthorized and fraudulent claims for various diagnostic
13 tests which include rectal sensation tests and EMG studies
14 of the anal or urethral sphincter. These tests were
15 medically unnecessary and were not requested by the
16 beneficiary or were not provided.

17 Shakbazyan is held accountable for fraudulently
18 billing Medicare approximately \$2,152,455. Medicare paid
19 \$1,188,993.82.

20 Additionally, Shakbazyan paid kickbacks approximately
21 \$100 per patient to the arbiters who would provide
22 patients to the clinic.

23 The large amount of money fraudulently obtained over
24 the course of two months is significant. Although an
25 upward departure has been identified due to the

1 significant prison range and injunction of the factors
2 listed under 18 United States Code Section 3553(a), I
3 believe that in large part because of his plea of guilty a
4 sentence at the bottom of the guideline range is
5 appropriate. This sentence would adequately reflect the
6 seriousness of the events, promote respect for the law,
7 provide deterrence to future criminal conduct and address
8 the defendant's background and characteristics.

9 A three-year term of supervised release would be
10 adequate to allow for monitoring and to provide the
11 defendant with the necessary time to address any criminal
12 monetary punishment imposed.

13 Based upon the defendant's financial profile and the
14 substantial amount of restitution owed it is -- I do not
15 think he has the ability to pay a fine in the prescribed
16 guideline range nor does he have the ability to pay a
17 reduced fine, and I will impose a special assessment for a
18 total of \$2,100 mandated by statute.

19 Pursuant to the Sentencing Reform Act of 1984 it is
20 the judgment of the Court that the defendant, Edgar
21 Shakbazyan, is hereby committed to the custody of the
22 Bureau of Prisons to be imprisoned for a term of 97 months
23 as to each Counts 1, 2 through 20 and 21 to be served
24 concurrently for a total term of 97 months.

25 Upon release from imprisonment the defendant shall be

1 placed on supervised release for a term of three years.

2 This term consists of three years as to each Counts 1, 2
3 through 20 and 21, all six terms to run concurrently.

4 Within 72 hours of release from the custody of the Bureau
01:10:17 5 of Prisons the defendant shall report in person to the
6 probation office in the district to which the defendant is
7 released.

8 While on supervised release the defendant shall not
9 commit another Federal, State or local crime, shall comply
01:10:27 10 with the standard conditions as adopted by this Court
11 under General Order No. H-1996-10, abide by any mandatory
12 conditions required by law and shall comply with the
13 following additional conditions.

14 The defendant shall not possess a firearm, ammunition,
01:10:40 15 destructive device or any other dangerous weapon. The
16 defendant shall cooperate in the collection of a DNA
17 sample from the defendant if the collection of such a
18 sample is authorized pursuant to Section 3 of the DNA
19 Analysis Backlog Elimination Act of 2000.

01:10:55 20 The defendant is required to provide the probation
21 officer access to any requested financial information, and
22 the defendant is prohibited from incurring new credit
23 charges or opening additional lines of credit without
24 approval of the probation officer.

01:11:09 25 The defendant is prohibited from possessing a credit

1 access device such as a credit card unless first
2 authorized by the probation officer. The defendant shall
3 participate in a program, inpatient or outpatient, for the
4 treatment of drug and/or alcohol addiction, dependency or
01:11:25 5 abuse which may include but not be limited to urine,
6 breath, saliva and skin testing to determine whether the
7 defendant has reverted to the use of drugs and/or alcohol.

8 Further, the defendant shall participate as instructed
9 and as deemed necessary by the probation officer and shall
01:11:38 10 comply with all rules and regulations of the treatment
11 agency until discharged by the program director with the
12 approval of the probation officer.

13 The defendant shall further submit to such drug
14 detection techniques in addition to those performed by the
01:11:53 15 treatment agency as directed by the probation officer.

16 The defendant will incur costs associated with such
17 drug/alcohol detection and treatment based on ability to
18 pay as determined by the probation officer. It is further
19 ordered that the defendant pay restitution in the amount
01:12:06 20 of \$1,188,993.82 to Medicare, payable to the following
21 address: CMS Division of Accounting Operations; 7500
22 Security Boulevard; Mail Stop C3-1-03; Baltimore, Maryland
23 21244-1850.

24 It is further ordered that the defendant is jointly
01:12:28 25 and severally liable with Dennis B. Barson, Jr., Criminal

1 No. 4:13-CR-367, Defendant 1, and Dario Juarez,
2 4:13-CR-367, Defendant 2, to pay restitution in the amount
3 of \$1,188,993.82 to Medicare.

01:12:51 4 The defendant's restitution obligation shall not be
5 affected by any restitution payments that may be made by
6 other defendants in this case except that no further
7 payment shall be required after the sum of the amounts
8 paid by all the defendants has fully covered all the
9 compensable losses.

01:13:02 10 It is further ordered that the defendant shall pay to
11 the United States a special assessment of \$2,100. The
12 Court finds that the defendant does not have the ability
13 to pay a fine and will waive the fine in this case.
14 Having assessed the defendant's ability to pay, payment of
01:13:20 15 the total criminal monetary penalties shall be payable
16 immediately and the defendant shall make a lump sum
17 payment of \$2,100 due immediately and then the balance due
18 on the whatever amounts are not immediately payable. The
19 balance due will be 50 percent of any wages earned while
01:13:44 20 imprisoned in accordance with the Bureau of Prisons Inmate
21 Financial Responsibility Program.

22 Any balance remaining after release from imprisonment
23 shall be due in monthly installments of at least
24 10 percent of the defendant's gross income to be changed
01:14:00 25 during supervision, if needed, based on the defendant's

1 changed circumstances or \$200 per month, whichever is
2 greater, to commence 30 days after release from
3 imprisonment to a term of supervision. Payment is to be
4 paid to the United States District Clerk Southern District
5 of Texas.

01:14:15

6 Mr. Shakbazyan, to the extent you have not waived your
7 right to appeal you have a right to appeal your conviction
8 and your sentence. If you do not have the funds to pay
9 for an attorney, one will be provided for you at the
10 Government's expense along with any transcripts or other
11 documents necessary for such an appeal.

01:14:24

12 Is there anything else?

13 MR. GERAGOS: Could we also -- for the record,
14 objection to the sentence, which I think we have to do.

01:14:35

15 Could the Court make a recommendation that he
16 self-surrender or serve his time at Lompoc, which is a
17 facility in California, which is in proximity to his
18 family?

01:14:50

19 That it also be a recommendation because they won't
20 just do it. You have to go through the hoops on the drug
21 program. He has got a demonstrable drug addiction that he
22 has been working through.

01:15:04

23 And then self-surrender. I have talked with the U.S.
24 attorney about this. One of the things we're going to do
25 is we're going to stipulate -- the other U.S. attorney who

1 is back there -- stipulate to the preliminary order and
2 then hopefully within the next -- I have related to them I
3 know where this property is. It's a fairly hot real
4 estate market. Try to get that property sold immediately
01:15:22 5 so that the moneys can come back to the United States
6 Government. And then, we're in the process of stipulating
7 or hoping to come to a settlement once we have sold the
8 property. I need his assistance to do that. And I don't
9 think the Government has got any objection to that.

01:15:41 10 MR. BALBONI: The United States has no objection
11 to self-surrender, Your Honor.

12 THE COURT: All right. Mr. Shakbazyan, do you
13 understand that you will be asked to sign a document that
14 indicates that you will report to whatever facility you
01:15:49 15 are designated to on the day and time that is in an order
16 that will come a little bit later? Do you understand
17 that?

18 DEFENDANT SHAKBAZIAN: Yes, Your Honor.

19 THE COURT: All right. As far as your
01:16:04 20 objections, they are overruled.

21 And then, I will recommend to the Bureau of Prisons
22 that Mr. Shakbazyan be designated to the facility in
23 Lompac, which is close to his home, which you know they
24 don't have to follow my recommendations.

01:16:18 25 MR. GERAGOS: I understand.

1 THE COURT: And also, I will recommend to the
2 Bureau of Prisons that Mr. Shakbazyan be allowed to
3 participate in the 500-hour drug treatment program while
4 he is incarcerated. Again, they don't have to follow my
5 recommendations, --

01:16:29

6 MR. GERAGOS: I understand.

7 THE COURT: -- as you noted.

8 MR. GERAGOS: I understand.

9 THE COURT: Is there something else?

01:16:35

10 MR. BALBONI: Yes, Your Honor. Again, just to
11 make sure we're clear on something, so Ms. Rollinson
12 doesn't yell at me when we get back to the office with
13 regard to the forfeiture, that again, in this instance, we
14 have two motions for preliminary order of forfeiture. One
15 being for the house, which I believe is the stipulation;
16 and there is also one for a personal money judgment in the
17 amount of the total loss, which is the \$1,188,993.82.

01:16:46

18 MR. GERAGOS: You have already ordered that as
19 restitution.

01:16:58

20 THE COURT: Okay.

21 MS. ROLLINSON: There are separate aspects. So
22 I'm not sure if we're going to have a separate forfeiture
23 hearing or if it's going to be short now that we have kind
24 of agreed on the house.

01:17:13

25 THE COURT: Well, okay. I will -- you have

1 stipulated to Mr. Shakbazyan's aspect of this forfeiture
2 order, right?

3 MR. GERAGOS: That's correct, Your Honor.

01:17:28

4 THE COURT: All right. So I can sign -- well,
5 that's not it. You have got both of those orders?

6 (Discussion off the record.)

7 MS. ROLLINSON: Do you want me to clarify on the
8 orders, Your Honor?

9 THE COURT: Yes.

01:18:01

10 MS. ROLLINSON: I moved for money judgments, and
11 I have three separate orders on money judgments. We
12 misunderstood each other.

13 THE COURT: We can't find those in our system.

01:18:11

14 MS. ROLLINSON: I have the money judgment orders,
15 and I have them with me. I gave them as to Mr. Juarez;
16 and I have the other two, also.

17 THE COURT: I have got Mr. Juarez. I need the
18 other two. I would like to have the other two, also.

01:18:20

19 MS. ROLLINSON: Okay. And then separately is the
20 house order which applies to all three defendants, and it
21 cuts off all three defendants' rights in the house. I
22 don't think they are claiming any. I would think that
23 that would be okay with everybody.

24 MR. GERAGOS: I don't think anybody --

01:18:35

25 THE COURT: No one is claiming the house

1 except --

2 MR. GERAGOS: Mr. Shakbazyan.

3 THE COURT: -- Mr. Shakbazyan.

4 MR. GERAGOS: He is going to facilitate the sale,
01:18:44 5 and I'll keep the Government apprised of where we are at
6 with that.

7 MS. ROLLINSON: I'm sorry.

8 MS. FRAZIOR: We have Shakbazyan here. Do you
9 have Juarez already? You have Juarez' order already; is
01:18:59 10 that correct?

11 MS. ROLLINSON: We handed up Mr. Juarez' earlier,
12 and now we have Shakbazyan and Barson.

13 THE COURT: Yes. Yes. Yes. Okay. Okay. Now,
14 what I'm going to do now is I'm going to sign this
01:19:12 15 preliminary order of forfeiture, okay, with the
16 understanding that this is just about the house and that
17 it really applies only to Mr. Shakbazyan. The other two
18 defendants are not claiming any part of the house; is that
19 right?

01:19:50 20 MR. GERAGOS: That's my understanding as well.

21 MS. ROLLINSON: I just have their names on there,
22 Your Honor, because it's the proceeds of the conspiracy.
23 So it cuts off the rights in the house to all three of
24 them.

01:19:59 25 THE COURT: Okay. All right. So this should be

1 attached to each of the judgments; is that right?

2 MS. ROLLINSON: Yes, Your Honor.

3 THE COURT: All right.

01:20:09

4 MR. GERAGOS: Yes, because the proceeds at some
5 point will be applied to the money judgment.

6 MS. ROLLINSON: They would be applied to the
7 money judgment, not necessarily to restitution until we go
8 visit.

01:20:19

9 THE COURT: Right. But the rules require that
10 any order of forfeiture be attached or they be made part
11 of the judgment.

12 MR. GERAGOS: Correct.

13 MS. ROLLINSON: Yes, Your Honor.

01:20:28

14 THE COURT: All right. So we have got that done.
15 Then we have an order imposing personal money judgment on
16 Mr. Shakbazyan?

17 MS. ROLLINSON: Yes, Your Honor.

18 THE COURT: Is there any objection to that?

01:20:40

19 MR. GERAGOS: No. That is -- we're stipulating
20 to that.

21 MS. ROLLINSON: To the money judgment order?

22 MR. GERAGOS: The money judgment.

23 MS. ROLLINSON: Okay.

01:20:59

24 THE COURT: Okay. So we have got those two for
25 Mr. Shakbazyan. Now, as far as the --

1 MR. GERAGOS: Could I ask -- they need him
2 upstairs. Can we be excused, Mr. Shakbazyan and myself;
3 and he goes upstairs to Floor 10 or something?

4 THE COURT: Sure. Yes.

01:21:17 5 MR. GERAGOS: Thank you very much.

6 THE COURT: Thank you.

7 MR. WILLIAMS: Judge, I may be able to clean it
8 up a little bit. With respect to the personal money
9 judgment as to Barson, we can stipulate that we will rest
01:21:32 10 on our pleadings. We're not going to require any evidence
11 in light that the other defendant is not going to. So
12 we'll just rest on our pleadings as they stand.

13 THE COURT: All right. So Dr. Barson I will sign
14 that.

01:21:47 15 MR. WILLIAMS: Very well, Your Honor.

16 THE COURT: Your objections are there?

17 MR. WILLIAMS: Yes, Your Honor.

18 THE COURT: You rest on your pleadings. I'm
19 going to overrule your objections and sign the order.

01:21:57 20 MR. WILLIAMS: Very well, Your Honor. We have
21 another hearing in Judge Hoyt's court. May we be excused?

22 MR. HILDER: One other matter, though, as it
23 pertains to Mr. Barson, Judge. Just on the judgment we
24 would ask that the Court send Mr. Barson to alcohol --
01:22:11 25 make the recommendation for the alcohol abuse program.

1 THE COURT: I will. It's the same 500-hour drug
2 and alcohol program that they have standard in the Bureau
3 of Prisons. I will make a recommendation that he be
4 allowed to participate in that program while he is
5 incarcerated.

01:22:28

6 MR. HILDER: Thank you, Judge. Appreciate it.

7 THE COURT: You may be excused.

8 MR. DUPONT: Does that include me, Your Honor?

9 THE COURT: No. You have to tell me what your

01:22:44

10 position is on this order imposing personal money judgment
11 on Mr. Juarez.

12 MR. DUPONT: It's the same as Mr. Williams, Your
13 Honor.

14 THE COURT: You stand by your pleadings?

01:22:52

15 MR. DUPONT: Yes.

16 THE COURT: I overrule any objections contained
17 in your pleadings and sign this order imposing monetary
18 judgment. Thank you very much. You may be excused. We
19 stand adjourned.

20 (Proceedings adjourned at 1:22.)

21 Date: September 25, 2015

22 **COURT REPORTER'S CERTIFICATE**

23

24 I, Laura Wells, certify that the foregoing is a
25 correct transcript from the record of proceedings in the

1 above-entitled matter.

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/s/ Laura Wells

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Laura Wells, CRR, RMR

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